THE LAW OF PLEADINGS IN INDIA

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PREFACE

The civil cases in the courts are decided on pleadings of the parties and, therefore, there should be suitable and appropriate pleas. Defective pleadings after prove dangerous to the parties to the suits, and the cases are lost by careless and defective pleadings. So the lawyers and the law students must be familiar with the principles of pleadings very well.

The present Text-book is put into market so that the students may well understand the principles of pleadings. It has been broadly divided into two Parts. Part I deals with the rules and law of pleadings and in Part II the Plaints and the Written Statements have been drafted. The various Chapters in Part I give in detail the relevant provisions of the Code of Civil Procedure.

In the present book, the relevant principles have been explained and fully discussed, and the latest decisions of the Supreme Court and various High Courts have been incorporated.

This book will prove useful to the teachers, law students and the beginners in the legal profession so as to enable them to have sound knowledge on the subject of law of pleadings.

R. DAYAL

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LAW OF PLEADINGS

CHAPTER I

DEFINITIONS

Decree.—"decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit.

Decree may be either preliminary or final.

Decree is deemed to include—

(i) the rejection of plaint ; and

(ii) the determination of any question within—

1. Section 47 (Questions to be determined by the Court executing decrees) ; or

2. Section 144 (Application for restitution).

But Decree does not include—

(a) any adjudication from which an appeal lies as an appeal from an order ; or

(b) any order of dismissal for default. (Section 2 (2) of the Code of Civil Procedure).

Decree-holder.—"decree-holder" means any person in whose favour—

(a) a decree has been passed ; or

(b) an order capable of execution has been made. (Section 2 (3) of the Code of Civil Procedure).

District.—"district" means the local limits of the jurisdiction of a principal Civil Court of original jurisdiction, called a *District Court*.

'District' includes the local limits of the ordinary original civil jurisdiction of a High Court. (Section 2 (4) of the Civil Procedure Code).

Final decree.—A decree is final when the adjudication which conclusively determines the rights of the parties, completely disposes of the suit. (Explanation to Section 2 (2) of the Civil Procedure Code).

A decree may be partly final.

Foreign court.—"foreign court" means a court—

(a) situate outside India ; and

(b) not established or continued by the Central Government. (Section 2 (5) of the Code of Civil Procedure).

Foreign judgment.—"foreign judgment" means the judgment of a foreign Court. (Section 2 (6) of the Code of Civil Procedure),

Government Pleader.—"Government pleader" includes—

(a) any officer appointed by the State Government to perform all or any of the functions expressly imposed by this Code on the Government Pleader ; and

(b) any pleader acting under the direction of the Government Pleader. (Section 2 (7), C. P. C.).

Judge.—"Judge" means the presiding officer of a Civil Court. (Section 2 (8), C. P. C.).

Judgment.—"Judgment" means the statement given by the Judge of the grounds of a decree or order. (Section 2 (9), C. P. C.).

Judgment-debtor.—"Judgment-debtor" means any person against whom—

(a) a decree has been passed ; or

(b) an order capable of execution has been made. (Section 2 (10) C. P. C.).

Legal representative.—"legal representative"—

(a) means a person who, in law, represents the estate of a deceased person ; and

(b) includes—

(i) any person who intermeddles with the estate of the deceased ; and

(ii) where a party sues or is sued in a representative character, the person on whom the estate devolves on the death of the party so suing or sued. (Section 2 (11), C. P. C.).

Mesne profits.—"mesne profits" of property means those profits which the person in wrongful possession of such property actually received or might, with ordinary diligence, have received therefrom, together with interst on such profits.

It does not include profits due to improvements made by the person in wrongful possession. (Section 2 (12), C. P. C.).

Pleader.—"pleader"—

(a) means any person entitled to appear and plead for another in Court; and

(b) includes an advocate, a Vakil and an attorney of a High Court. (Section 2 (15), C. P. C.).

Preliminary decree.—A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. (Explanation to Section 2 (2) of the Code of Civil Procedure).

A decree may be partly preliminary.

Public Officer.—"public officer" means a person falling under any of the following descriptions, namely :

(a) every Judge ;

(b) every member of the Indian Civil Service ;

(c) every commissioned or gazetted officer in the military, naval or air forces of the Union, while serving under the Government ;

(d) every officer of a Court of Justice whose duty it is, as such officer, to investigate or report on any matter of law or fact, or to make, authenticate or keep any document, or to take charge or dispose of any property, or to execute any judicial process, or to administer any oath, or to interpret, or to preserve order, in the Court, and every person especially authorised by a Court of Justice to perform any of such duties ;

(e) every person who holds any office by virtue of which he is empowered to place or keep any person in confinement ;

(f) every officer of the Government whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health safety or convenience ;

(g) every officer whose duty it is, as such officer, to take, receive, keep or expend any property on behalf of the Government, or to make any survey, assessment or contract on behalf of the Government or to execute any revenue-process, or to investigate, or to report on, any matter affecting the pecuniary interests of the Government or to make, authenticate or keep any document relating to the pecuniary interests of the Government, or to prevent the infraction of any law for the protection of the pecuniary interest of the Government ; and

(h) every officer in the service or pay of the Government, or remunerated by fees or commission for the performance of any public duty. (Section 2 (17), C. P. C),

Savings.—(1) In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect—

(a) any special or local law in force ; or

(b) (i) any special jurisdiction or power conferred, or

(ii) any special form of procedure prescribed by, or under, any other law in force.

In particular and without prejudice to the generality of the proposition contained in sub-section (1),

nothing in this Code shall be deemed—

(a) to limit ; or

(b) otherwise affect,

any remedy which a land holder or landlord may have under any law in force for the recovery of rent of agricultural land from the produce of such land. (Section 4, C. P. C.).

Subordination of Courts.—For the purposes of the Code of Civil Procedure,—

(a) the District Court is subordinate to the High Court ; and

(b) (i) every Civil Court of a grade inferior to that of a District court; and

(ii) every Court of Small Cause,

is subordinate to the High Court and District Court. (Section 3 of the Code of Civil Procedure).

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CHAPTER II

PARTIES TO SUITS

Order I of Civil Procedure Code deals with array of parties to suits. It contains the rules as to who should be joined as plaintiffs and who should be joined as defendants in the same suit.

Who may be joined as plaintiffs.—All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions, is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise. (O. I., R. 1).

Rule 1 deals with joinder of plaintiff. Two types of cases may arise :—

(*i*) A num er of plaintiffs may be jointly interested in the same cause of action, for example, co-sharers in a suit for ejectment, partners in a suit concerning partnership business : or

(*ii*) They may not be so jointly interested.

If the persons are jointly interested in the same cause of action, not only they may join but as far as possible they must joint as plaintiff because the cause of action vests in them jointly and no relief can be given in the absence of any one of them. If one or more of them refuse to join as plaintiffs, they must be impleaded as *pro forma* defendants.

Even if they are not so jointly interested, several plaintiffs may join in the same suit in view of the provisions of Rule 1 of Order I.

According to Rule 1, the cause of action need not be one and identical; several persons (plaintiffs) having separate causes of action can join in one suit, provided—

(*i*) the right to relief alleged arises out of the same act or transaction, and

(*ii*) a common question of law or fact arises.

For example, several persons jointly prosecuted by the defendants may bring a joint suit for malicious prosecution.

The **policy of the rule** is that, even in cases where the plaintiffs seek individual reliefs, where the investigation would to a great extent be identical in each individual case, they may unite as co-plaintiffs and thus avoid needless expense.

Where, however, it appears to the Court that any joinder of plaintiffs may embarrass or delay the trial of the suit, the Court may put the plaintiffs to their elections or order separate trials. (R. 2).

The provisions of Rule 1 of Order I are not imperative and obligatory nor are they exhaustive of all cases of joinder of plaintiffs.

Illustration on joind r of plaintiff —A published a series of books under the title of : " The Oxford and Cambridge Publications" so as to induce the belief that the books are publications of the Oxford and Cambridge Universities or either of them. The two Universities may join as plaintiffs in one suit to restrain A from using the title, because the publication and the belief induced are common question of fact arising out of the same series of transactions.

Joint writ petition.—In *Halsbury's Laws of England.* Third Edition, Volume 11, the subject of enforcement of separate claims have been discussed on page 83 under Section 155 :—

"Two persons cannot join in a single application for an order of mandamus to enforce separate claims. There must be separate applications for separate orders although the several applicants are successors in the office in respect of which the claims arise."

In *Extraordinary Legal Remedies* by Ferris, the question of joinder has been discussed under section 233 on page 275—

"The rule is that persons having a common and joint interest in the subject matter in controversy may be joined as relators, while those having separate and distinct right may not."

In *Corpus Juris Secundum*, Volume 14, the following passage is found on page 205 :—

"It is improper to join persons who are not jointly interested in the proceeding of which a review is sought, and whose interests are separate and distinct. Parties severally affected by the proceedings below must sue out separate writs, although there is but one act to be reviewed and but one record."

In *Bankim Chandra* v. *Regional Provident Fund Commissioner*, A. I. R. 1958 Pat. 314, it was held that a joint application under Article 226 for quashing several orders is not maintainable.

In *Bishwaranjan* v. *Secretary, Ram Krishna Mission*, A. I. R. 1958 Pat. 653. It was held that separate applications must be made for issue of separate writs to quash separate orders.

In *Muhammad Ibrahim* v. *Deputy Commercial Tax Officer*, A. I. R. 1956 Mad. 626, it was held that the fact that similar orders are passed in the case of a number of individuals does not mean that the injury caused is a common or class injury so as to justify a single petition.

In *Ganapathi Nadar Factory* v. *State of Madras*, A. I. R. 1957 Mad. 616, the Government by a single notification referred disputes between seven establishments and their workmen to an Industrial Tribunal. These establishments filed a single writ petition against the Tribunal and the Government. It was held that a single petition was not maintainable.

In *Kailash Chandra* v. *District Registrar*, A. I. R. 1961 All. 61, licences of a number of deed-writers were cancelled. It was held that a joint writ petition by the former deed-writers was not maintainable.

In *Ramc and* v. *Anandlal*, A. I. R. 1962 Guj. 21, it was held that there must be separate application by every applicant for every main right or claim sought to be enforced in a writ petition. Two or more persons cannot join in a single application to enforce separate rights or claims by way of writs.

In *Mount Corporation* v. *Director of Industries and Commerce*, A. I. R. 1965 Mys. 148, it was held that if a number of persons have joint interest in the subject-matter but possess separate and distinct rights, a joint petition by them under Article 226 is not maintainable. Order I, R. 1, C. P. C. is not applicable.

In *Mandir Thakar Dawara* v. *State of Pepsu*, A. I. R. 1955 Pepsu 159, it was held that there must be separate applications for separate writs.

In *Inder Singh* v. *State of Rajasthan*, A. I. R. 1954 Raj. 185, there were 23 separate applications pending before the Anti Ejectment Officer. Twenty-three separate revisions were filed by the different applicants. The 25 cases were disposed of by the Board of Revenue by a single judgment. It was held

that it was not proper for the petitioners to file a single petition under Article 226 in respect of all the 23 cases.

In *Management of Rain Bow Dyeing Factory* v. *Industrial Tribunal*, A. I. R. 1959 Mad. 137, it was held that the provisions of Or. I of the Code of Civil Procedure cannot be applied to writ proceedings on the strength of the rule laid down by Sec. 141, C. P. C.

In *In re A. Gopalakrishnarao*, A. I. R. 1957 A. P. 88, it was held that two or more persons could not join in a single petition for a writ of mandamus to enforce separate claims. The principle of Or. I of the Code of Civil Procedure cannot be extended to such a case.

In *Uma Shankar Rai* v. *Divisional Superintendent, Northern Railway*, A, I. R. 1960 All. 366 (D. B.), it was held that, in case of a common right it is not open to the persons who are affected by a common order to file a joint writ petition. Writ jurisdiction is for the enforcement of an individual right. There can be no question of application of Order 1 of the Code of Civil Procedure in such proceedings.

This, there is much support for the view that, if a number of persons have separate claims, a joint writ petition is not maintainable. But the decision by the Division Bench of the Allahabad High Court in *Uma Shankar Rai's case* (A. I. R. 1960 All. 366) and the decisions by other High Courts are largely based on English and American cases. High Courts in India need not feel oppressed by technicalities of English law. In dealing with petitions under Article 226, High Courts exercise power conferred upon them by the Constitution of India. The power should be so exercised as to advance the course of justice. It was not suggested for the respondents that in trying civil suits civil courts experience any difficulty in operating Or. I, R. 1. C. P. C. On the contrary, that provision is highly convenient. If a number of persons have to place before the Court the same set of facts or have to urge the same question of law, there is not much point in insisting that they must file separate writ petitions. In the present case there are 21 petitioners. They have paid a court-fee of Rs. 50/- on the writ petition, if they are ordered to file 21 separate writ petitions, they will have to pay a total court-fee of Rs. 1,050/-. That would no doubt be a gain to revenue. But gain to revenue is not a circumstance, which can outweigh convenience of litigants and administration of justice. When a number of persons make the same grievance before the Court, it is usually convenient for the Court and the aggrieved persons to have the whole matter disposed of in a single proceeding.

In *Constitutional Law of India by Seervai*, the learned author observes on page 738 :—

".....There are cogent reasons for not following the strict technicalities of the English law in India.....for example, a law for the abolition of zamindaris may affect thousands of people, and it is submitted that it would be unjust and oppressive to drive thousands of persons to file separate petitions when the only question involved is whether the legislature was competent to enact the law or not, and a representative petition will completely dispose of the matter."

The provision of Or. I, R. 1, C. P. C. is premissive. The provision is subject to Or. I, R. 2, C. P. C. Ordinarily, if two or more persons put forward claims involving common questions of law and fact, such claims may be combined in a single suit. But if the Court finds that combining a number of claims in a single suit would be embarrassing, it is open to the Court to direct separate trials of different claims. The same procedure may be adopted at the hearing of writ petitions. Ordinarily, if a number of persons challenge

a single order or decisions involving common questions of law and fact, their claims may be combined in a single writ petition. But if the Court finds that it will not be convenient to dispose of so many claims in a single writ petition, the Court may direct the petitioners to file separate writ petitions.

Therefore, the following principles can be laid down :—

1. An application under Article 226 of the Constitution involving civil rights is a proceeding in a Court of civil jurisdiction. So, the provision of Or. I, R. 1, C. P. C. is applicable to such a proceeding.

2. Even if we assume that a writ petition is not a proceeding in a Court of civil jurisdiction, and Or. I, R. 1, C. P. C. in terms does not apply to such a proceeding, more persons than one can join in a petition under Article 226 of the Constitution under circumstances in which persons more than one can join as plaintiffs in a suit in accordance with the provisions of Or. I, R. 1, C. P. C.

An application under Article 226 of the Constitution is a proceeding in a court of civil jurisdiction if it relates to a civil matter, and as such the provisions of Or. I, R. 1 of the Code of Civil Procedure do apply to such a proceeding but only to the extent they are not inconsistent with the nature of the proceeding. Thus the joinder of more than one person under Article 226 can be permitted only wher the right to relief arises from the same act or transaction and there is a common question of law or fact or where though the right of claim does not arise from the same act or transaction the petitioners are jointly interested in the cause or causes of action. (Per Sahgal and Laksmi Prasad, JJ., in *Mall Singh* v. *Smt. Laksha Kumari Khaitan*, 1968 A. L. J. 208 (F. B.)).

In *Qurabali* v. *Government of Rajasthan*, A. I. R. 1960 Raj. 152, it was held that a joint application by several persons involving common questions is maintainable.

In *United Motors (India) Ltd.* v. *State of Bombay*, (1953) 4 S. T. C. 10 (Bom.) (D. B.), six corporations and one firm carried on the business of buying and selling motor-cars. They filed one petition under Article 226 of the Constitution challenging the validity of the Bombay Sales Tax Act, 1952. It was *held* that the petition was maintainable.

In *Manindra Nath* v. *Baranagore Municipality*, A. I. R. 1956 Cal. 291, Sinha J., observed :—

"Reference has been made to American Jurisprudence, Vol. 35, page 81, paragraph 333.

In my opinion, such highly technical rules of procedure should not be incorporated in our law. This is a poor country and litigation expenses are high. Multiplication of legal proceedings should be avoided at all costs."

On the other hand, in *Khem Karan* v. *State of U. P.*, A. I. R. 1966 All. 255 (S. J.), there was a single notification under section 4 of the Land Acquisition Act, and a single notification under section 6 of the Act. These notifications affected a large number of persons. It was *held* that all such persons may file a single petition under Article 226 of the Constitution challenging the validity of such action. It is to the convenience of all concerned and serves the interests of justice. In *Abdul Qayum* v. *Keshav Saran*, A. I. R. 1964 All. 386, the petitioners had a common cause of action, and sought a common relief arising out of identical facts. It was *held* that a joint writ petition by them is maintainable.

Separate suits.—The question which arises for determination is whether it is open to a creditor to bring a suit for his share of the debt after impleading the remaining creditors as defendants.

In *Abdul Hakim* v. *Adyata Chandra Das*, A. I. R. 1919 Cal. 593 : 22 C. W. N. 1021, it was observed that, in the absence of any evidence or circumstances which would justify a contrary inference, it will be presumed, notwithstanding the terms of the obligation, that the debt is due to the creditors in severalty. In *Nabendra Nath* v. *Shasabindoo Nath*, A. I. R. 1941 Cal. 595 : 197 I. C. 321, four brothers were running a joint money-lending business. One of the brothers, defendant no. 1, had drawn excessive amounts from the business and, after accounting, he executed a Hatchitha in favour of all the brothers. He, however, did not pay the money. Two of the brothers brought a suit for the recovery of their share. The legal representatives of the third brother was impleaded as a defendant as she declined to join as a plaintiff. It was contended on behalf of defendant No. 1 that the plaintiffs ought to have prayed for a decree for the entire amount due on the Hatchitha. This contention was overruled.

Therefore, where the debts in favour of several creditors were specified separately in an agreement and there is nothing to show that these debts lost their severalty and became a joint debt in favour of all the creditors (or, in other words, if the debts are due to the creditors in severalty), then one creditor can bring a suit for the recovery of his share of the debt after impleading the remaining creditors as defendants irrespective of the fact whether or not they were asked to join as plaintiffs and declined to do so. The remaining creditors thereby get an opportunity to safeguard their interest by bringing separate suits against the debtors in respect of the debts due to them individually. Where money is lent by several persons to another, the general rule in equity is that they will be regarded, *prima facie*, as tenants-in-common.

Sub-rule (1) of Rule 10 of Order I lays down that where—

(a) a suit has been instituted in the name of the wrong person as plaintiff; or

(b) it is doubtful whether it has been instituted in the name of the right piaintiff,

the court may, at any stage of the suit, if satisfied that—

(i) the suit has been instituted through a *bona fide* mistake; and

(ii) it is necessary for the determination of the real matter in dispute so to do

order any other person to be substituted or added as plaintiff upon such terms as the court thinks just.

No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent.' (O. I, Rule 10 (3).

Who may be joined as defendants.—All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transaction is alleged to exist, whether jointly, severally or in the alternative, if separate suits were brought against such persons, any common question of law or fact would arise. (O. I, R. 3).

The same rules of joinder of plaintiff are applicable to the joinder of defendants under this Rule.

All the defendants *jointly interested* in suit must be joined.

If the persons joined as defendants are *not jointly interested*, they may be joined in the same suit in view of the provisions of Rule 3 of Order I.

The provisions of Rule 3 are not imperative and obligatory nor are they exhaustive of all cases of joinder of defendants.

The *object of this Rule* and Rule 1 is to avoid multiplicity of suits and needless expense if it could be done without embarrassment to the parties and to the Court. All persons may, therefore, be joined as defendants against whom any right to relief is alleged to exist, provided that—

(1) such right arises in respect of the same act or transaction or serries of acts or transactions ; and

(2) the case is one where if separate suits were instituted against the defendants any common question of law or fact would arise.

For example, a Hindu reversioner may sue jointly all the alienees of a widow for recovery of property transferred by her separately to them.

Illustration on joinder of defendants.—A, riding in an omnibus belonging to B, is injured by a collision between the omnibus and a cart belonging to C. A sues B and C for damages for personal injury charging the defendants jointly with joint negligence, and alternatively charging separate negligence against each defendant. The suit is not bad for misjoinder of defendants because the injury to the plaintiff arose from the same transaction and the case involves common questions of fact. It is otherwise if the injury arises from distinct acts of B and C.

Where the plaintiff is in doubt as to the person from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined as between all parties. (O. I, R. 7).

The Court may, at any stage of the proceedings, order that the Central *Government* or a State Government shall be added *as a defendant in any suit involving a substantial question of law as to the interpretation of the Constitution, if*—

(a) the Attorney-General of India or the Advocate-General of the State, as the case may be,

whether upon receipt of notice or otherwise,

applies for such addition ; and

(b) the Court is satisfied that such addition is necessary or desirable for the satisfactory determination of the question of law involved. (O. 27-A, R. 2).

Any person carrying on business in a name or style other than his own name, may be sued in such name or style as if it were a firm-name. (O. 30, R. 10).

Rule 10 of Order 30 corresponds to Rule 11 of Order 48-A of the Rules of the Supreme Court of England.

The filing of the written statement by a Company (say, the Modi Vanaspati Manufacturing Co.) and the signing of the Written Statement and the verification by the constituted attorney of the Modi Sugar Mills Ltd. does

not indicate the appearance of the Company as the defendant. [*Per* Ray, J., in *Modi Vanaspati Manufacturing Company* v. *Katihar Jute Mills (Private) Limited.*, A. I. R. 1969 Cal. 496 (D. B.)].

The provisions contained in Order 30, rule 10 allow a person carrying on business to be sued in that business-name. The essence of the matter is that there is a legal entity or a juristic personality who is being sued in the firm-name. The provisions contained in Order 30 apply to suits where a defendant is sued as a legal entity under the provisions of Order 30, rule 10. The provisions contained in Order 30 allow a body of persons to be sued in their business-name or in their firm-name. (*ibid.*).

It is well settled that the business-name or the firm- name is neither a legal entity nor a juristic person. The legal entities are the persons who carry on business under that name. (*ibid*).

A Company, being a legal entity, can sue and be sued only in accordance with the provisions contained in Order 29 of the Code of Civil Procedure. To allow a limited company to be sued in the business-name would be an inroad upon the Code in the sense that a suit would be competent against a defendant which has no legal basis and no legal character. It is only because an individual or a body of individuals carry on business in a certain name that the compendious name is recognised under the prov sions of Order 30 so that it is known that the legal persons are the persons sued in that name. (*ibid*).

The legal person being a limited company, the suit against the Modi Vanspati Manufacturing Firm or company is not maintainable and is incompetent. Such Firm or Company is not a *person* within the meaning of Order 30. (*ibid*).

The word 'person' in Order 30 refers to individuals and not to corporations because corporations are dealt with in Order 29. Further, Order 30 does not recognise a trading name but it recognises only the individual persons who are legal entities carrying on trade in a name. (*ibid*).

Under the general law of procedure, only a juristic person can sue or be sued. A partnership firm is not a juristic entity. An exception to the general law of procedure, namely, that an action can be brought by or against a juristic person only, was made in the case of a partnership firm by Order 30 of the Civil Procedure Code. (*Per* Mukerjea, J., in *Modi Vanaspati Manufacturing Company* v. *Katihar Jute Mills (Private) Ltd.*, A. I. R. 1969 Cal. 496 (D. B.)),

Rule 10 of Order 30 applies even where a number of persons carry on business under an assumed or trading name even though they do not constitute a partnership firm, as, for example, a Hindu joint family business. (A. I. R. 1944 Cal. 138 (D. B.) = 48 C. W. N. 203 ; *Alekh Chandra* v. *Krishna Chandra*, A. I. R. 1941 Pat. 596 = I. L. R. 20 Pat. 755 ; *Rameshwar Prasad* v. *Keshav Prasad*, A. I. R. 1962 Pat. 360 = 1962 B. L. J. R. 473 ; *Harisankar* v. *General Merchants Ltd.*, A. I. R. 1956 Orissa 186). These decisions, however, do not lay down that Rule 10 of Order 30 is intended to apply not only to individuals but also to artificial persons.

Order 30, rule 10 is applicable only to the case of a single individual. (*Chidambaram* v. *National City Bank of New York*, A. I. R. 1936 Mad. 707 (D. B.) = I. L. R. (1937) Mad. 28).

The words in the heading "persons carrying on business.....other than their own" only have reference to Rule 10 under which a single individual may be sued though he cannot sue if he carries on business under a name other than his own. (*Lalchand* v. *M. C. Boid & Co.* A. I. R. 1934 Cal. 810 (S. J.) = 38 Cal. W. N, 914).

If, by Rule 10 of Order 30, only an individual .is intended, the rule cannot apply to artificial persons which corporations,are. (*Per* Mukherjea, J. in *Modi Vanaspati Manufacturing Company* v. *Katihar Jute Mills (Private) Limited* A. I. R. 1969 Cal. 496 (D. B.)).

Order 30, rule 10 enjoins that so far as the nature of the case will permit, all rules under that order will apply. Rule 10 cannot apply to a Company and no other rule of Order 30 can possibly apply to a Company. Order 29 specifically provides for suits by or against Corporations. Rules 1, 2 and 3 of Order 29 are important safeguards which the law provides in the interests of a Corporation which is an artificial person and in which the interests of a large number of shareholders are often involved. Unless it is provided expressly or by necessary intendment, it is not to be assumed that Orde: 30 intended to deprive a company of these safeguards by permitting an action to be brought under Order 30 against a Corporation in .its assumed name. In construing Rule 10 of Order 30, it has to be considered how a decree passed against a Corporation in its assumed name can be executed, if such a decree can be passed at all. There is no provision in the Code for execution of such a decree. (*ibid*). Rule 50 of Order 21 will have to be necessarily referred to for the purpos e of execution of a decree passed against a firm or an individual carrying on business in an assumed name. This Rule is not applicable to execution of decrees passed against the Corporation. (*ibid*).

In the context of—

(a) Order 30 itself,

(b) Order 29, and

(c) other relevant provisions of the Code ;

and on a consideration of the history of Order 30, Rule 10,

it was held that the words "any person" in Rule 10 of Order 30 contemplate only an individual but not an artificial person which a Corporation or a company is. (*ibid*, at page 514).

Meaning of the word 'person'.—Sub-section (42) of section 3 of the General Clauses Act provides that, unless there is anything repugnant in the subject or context, 'person' shall include—

(a) any company, or

(b) association or body of individuals, whether incorporated or not.

This definition closely resembles the definition of 'person' in section 19 of the Interpre tation Act, 1899 (an English statute) which consolidates earlier enactments. This section 19 reads as follows :—

"In this Act and in every Act passed after the commencement of this, the expression 'person' shall,

unless the contrary intention appears,

include any body of persons corporate or unincorporate."

In the English case of *Pharmaceutical Society* v. *London and Provincial Supply Association Ltd.*, [1880] 5 A. C. 827 : 49 L. J. Q. B. 736, it was provided by section 1 of 31 and 32 Vict. C. 121, that it shall be unlawful for every *person*—

(a) to sell, or

(b) to keep open shop for—

(i) retailing,

(ii) dispensing, or
(iii) compounding

poisons, or

(c) to assume the title of chemist and druggist,

unless such person shall be a pharmaceutical chemist within the meaning of the Act and be registered under the Act.

A small body of persons had obtained a registration under the Companies Act of 1862-1867. One only of these persons was qualified and registered chemist. His share in the company was very small. He was the person who appeared in the shop and conducted the same and he received a salary for his labour in dispensing the drugs.

It was *held* by the House of Lords that—

(i) Whether the word 'person' in a statute can be treated as including a Corporation, must depend on a consideration of the object of the statute and of the enactments passed with a view to carrying out that object into effect.

(ii) In the present circumstances, the word 'person' in the relevant section of the statute does not apply so as to make the incorporated company liable to the penalty. The actual seller must be a qualified person.

Lord Blackburn said :

"*Person* may very well include both—
(a) a natural person (a human being), and
(b) an artificial person (a corporation).

I think that, in an Act of Parliament, unless there be something to the contrary, it ought to be held to include both.

In common talk, the language of men not speaking technically, a 'person' does not include an artificial person, that is to say, a corporation. Nobody in common talk if he were asked who is the richest person in London, would answer The London & North-Western Railway Company. The thing is absurd. It is plain that in common conversation and ordinary speech, a 'person' would mean a natural person.

In technical language, it may mean the artificial person.

In which way this word is used in any particular Act, must depend upon the context and the subject-matter.

I do not think that the presumption that it does include an artificial person (a corporation), if that is the presumption, is at all a strong one. Circumstances, and indeed circumstances of a slight nature in the context, might show in which way the word is to be construed in the Act of Parliament, whether it is to have the one meaning or the other.

I am quite clear about this that whether you can see that the object of the Act requires that the word 'person' shall have the more extended or the less extended sense, then, whichever sense it requires, you should apply the word in that sense and construe the Act accordingly."

In Section 46 of the Solicitors Act, 1932, imposing a penalty on any person not having a practising certificate and pretending to be qualified to act as a solicitor, it was held that 'person' does not include a Corporation. (*Law Society* v. *United Service Bureau Ltd.*, [1934] 1 K. B. 34=103 L. J. K. B. 81). A Corporation is not a 'person' within the meaning of The Charitable Uses Act, 1735. (*Walker* v. *Richardson*, 6 L. J. Ex. 229).

On the other hand, where a trustee of a will had power to grant lease to any person or persons he should think fit, it was held that the will authorised him to grant a lease to a limited company. (Re. *Jeffcock*, 51 L. J. 507). An unincorporated body is a "person" within the meaning of the Coal Distribution Order, 1943. (*Davey* v. *Shawcroft*, [1948] 1 All E. R. 827=64 T. L. R. 289). A respectable and responsible person within the meaning of a covenant includes a Corporation, such as a limited company. (*Wilmet* v. *London Roadcar Co. Ltd.* [1910] 2 Ch. 525=103 L. T. 447). In *Chuter* v. *Freeth and Peacock Ltd.*, [1911] 2 K. B. 832=80 L. J. K. B. 1322, the question came up for consideration whether a company is a person within the meaning of section 20, sub-section (6), of the Sale of Food and Drugs Act, 1899 which provided as follows :—

"Every person who, in respect of an article of food or drug sold by him as principal or agent, gives to the purchaser a false warranty in writing, shall be lia le, on summary conviction, for the first offence, to a fine.....

unless he proves to the satisfaction of the Court that, when he gave the warranty, he had reason to believe that the statements or descriptions contained therein were true."

It was *held* by Lord Alverstone, C. J., that a Corporation is well within the meaning of the expression 'person' because a Corporation is capable of giving a warranty through its agents.

The fact is that the neuter pronoun 'it' in Order 30, rule 10 can never be used with reference to a 'person' and, therefore, the use of the masculine pronoun cannot affect the question of construction. (*Per* Mukherjea J., in *Modi Vanaspati Manufacturing Company* v. *Katihar Jute Mills (Private) Limited*, A. I. R. 1969 Cal. 496 (D, B.)).

The expression 'person' in Rule 10 of Order 30 does not include a company. (*ibid*). A company cannot be sued in a name other than its own which it assumes for the purpose of carrying on business. It can only be sued in its corporate name. (*ibid*).

Parties in suits by or against firms.—In a suit by or against a firm,—

(*i*) all the partners may sue individually in their own names ;

(*ii*) or they may sue in the firm-name—*e. g.*, as "A, B., a firm carrying on business in partnership at Bombay" ;

(*iii*) any partner may, on behalf of the firm, sign or verify a plaint as follows :

"A, B, a partner of the firm."

Suit by or against joint Hindu family firms must be brought either in the name of all the members of the firm or in the name of the Manager as such and not in the name of the firm.

If an individual carries on some business in a name other than his own, he must sue in his individual name, though he may be sued either in his

individual name or in the name in which he carries on business. For instance, if A carries on business under the caption "Agarwal Book Depot", A must sue in his own name "A" though he may be sued as "A" or as "Agarwal Book Depot."

Section 69 of the Partnership Act which is express and manda tory, provides that no suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against a party, unless the firm is registered.

If the plaintiff admits that his suit is on behalf of an unregistered partnership, the Court must immediately dismiss the suit in view of Section 69 of the Partnership Act, whatever be the nature of the pleadings. (*Sriram Sardarmal Didwani* v. *Gouri Shankar*, A. I. R. 1961, Bom. 136 (D. B.)=62 Bom. L. R. 336).

Parties in suit in name of firm.—Any two or more persons—

(a) claiming or being liable as partners ; and

(b) carrying on business in India,

may sue or be sued in the name of the firm (if any) of which such persons were partners at the time of the accruing of the cause of action.

Any party to a suit may, in such case, apply to the Court for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, partners in such firm, to be furnished and verified in such manner as the Court may direct. (O. 30, R. 1 (1)).

It is well settled that a suit can be filed against a firm even after its dissolution in the name of the firm. (*Thomas Bear & Sons Ltd.* v. *Rulia Ram*, A.I. . 1934 Lah. 625 : 148 I. C. 763 ; *Pulin Bihari Roy* v. *Mahendra Chandra Ghosal*, A. I. R. 1921 Cal. 722 : 34 Cal. L. J. 405 ; *Harjibandas Gordhandas* v. *Bhagwandas Pursram*, A. I. R. 1922 Cal. 390 : I. L. R. 49 Cal. 394 ; *Maurice Mayahas* v. *W. Morley*, A. I. R. 1925 Cal. 937 : 29 Cal. W. N. 496 ; *Agarwal Jorawarmal* v. *Kasam*, A. I. R. 1937 Nag. 314 : I. L. R. (1937) Nag. 28 ; *Firm Gopal Company Ltd.* v. *Firm Hazarilal Co.*, A. . R. 1963 M. P. 37 : 1962 M. P. L. J. 781 ; *Ram Swarup Maru* v. *State of Bihar*, A. I. R. 1969 Pat. 340 (D. B.)).

(1) Notwithstanding anything contained in section 45 of the Indian Contract Act, IX of 1872, where two or more persons may sue or be sued in the name of a firm and *any of such persons dies*, whether before the institution or during the pendency of any suit, it shall not be necessary to join the legal representative of the deceased as a party to the suit.

(2) Nothing in sub-rule 1) shall limit or otherwise affect any right which the legal representative of the deceased may have—

(a) to apply to be made a party to the suit, or

(b) to enforce any claim against the survivor or survivors. (O. 30, R. 4).

Parties in suits by or against Trustees, Executors and Administrators.—In all suits concerning property vested in a trustee, executor or administrator, where the contention is between the persons beneficially interested in such property and a third person,—

(a) the trustee, executor or administrator represents the persons so interested ; and

(b) it is not ordinarily necessary to make them parties to the suit.

But the Court may, if it thinks fit, order them or any of them to be made parties. (O. 31, R. 1).

When there are several trustees, executors or administrators, they are all made parties to a suit against one or more of them. But—

(a) the executors who have not proved their testator's will ; and

(b) trustees, executors and administrators outside India, need not be made parties. (O. 31, R. 2).

Unless the Court directs otherwise, the husband of a married trustee administratrix, or executrix shall not, as such, be a party to a suit by or against, her. (O. 31, R. 3).

Suits by or against trustees, executor or administrator should be as follows :—

"A. B., son of....., aged...years, resident of....., Banaras, trustee of the estate of C. D. deceased."

Or

"A. B., son of....., aged...years, resident of....., Moradabad, executor of C. D. deceased."

If there are more trustees or executors than one, all should be joined as parties as plaintiffs or defendants.

Parties in suits relating to mortgages of immovable property.— All persons having an interest in—

(a) the mortgage security ; or

(b) the right of redemption,

shall be joined as parties to any suit relating to the mortgage.

A puisne mortgagee may sue for foreclosure or for sale without making the prior mortgagee a party to the suit.

A prior mortgagee need not be joined in a suit to redeem a subsequent mortgage. (O. 34, R. 1).

Order 34, rule 1, C. P. C. is subject to the provisions of the Code of Civil Procedure. If a puisne mortgagee is not made a party to the suit filed by a prior mortgagee for recovery of his mortgage dues, he will not be affected by a decree that may be passed. He can ignore the suit proceedings as well as the execution proceedings.

In the case of *K. N. Krishnaswami Bhagavathar* v. *N. A. Thirumalai Iyer*, A. I. R. 1926 Mad. 101 : 90 I. C. 410, it was observed :

"Where a *prior mortgagee makes the puisne mortgagee a party and brings the property to sale*, the puisne mortgagee can only proceed against the proceeds in Court after satisfying the claim of the prior mortgagee. In other words, his right of suit against the mortgagor is taken away by his being made a party to the *suit of a prior mortgagee*.

But the sale cannot affect the title of a mortgagee who has not been made a party to the suit. He can, therefore, either—

(a) proceed against the mortgaged property in the hands of purchaser by bringing it to sale ; or

(b) proceed against the sale proceeds in Court after satisfying the claims of the prior mortgagees.

His right is only subject to that of the prior encumbrancer but he has a prior claim over any simple money creditor who attaches the money in Court as the property of the mortgagor and the mortgagor certainly is not entitled to the money in Court in preference to the mortgagee whose debt he is liable to discharge.

Although O. 34, rule 1 requires all mortgagees to be brought on record, that would not take away the right of a puisne mortgagee not so joined as a party, to claim any amount in Court on the ground that he has an interest in the mortgaged property.

When the *sale is effected under a power of sale in the mortgaged-deed*, the mortgagee exercising such power is a trustee so far as the surplus proceeds are concerned and the Court was not in a better position than he. When the mortgagee exercises his power of sales he sells it free of encumbrances and the purchaser gets it free of all subsequent encumbrances. But when a Court sells the property under a decree to which the subsequent mortgagee is not a party, it does not sell it free of the subsequent encumbrances.

When the mortgaged property is sold and is converted into money, the right of the puisne mortgagee is not thereby lost. I am assuming in this connection that he was not a party either to the suit or to the execution proceedings in which the assets were realized. The property was his primary security and when that is converted into money, his security is not thereby lost, but is transferred from the property to the sale-proceeds, and his right is only subject to that of a prior mortgagee or mortgagees. The objection to the puisne mortgagee proceeding against such assets is that the assets represented only the value of the equity of redemption remaining at the date of the sale and therefore the puisne mortgagee cannot proceed against the proceeds in Court. This argument overlooks the fact that the equity of redemption, whatever be its value, is liable either in the hands of the mortgagor or of a purchaser from him to satisfy the claim of the mortgagee."

In the case of *Ratan Chand* v. *Prite Shah*, A. I. R. 1962 Punjab 402 (D. B.): I. L. R. (1962) 2 Punjab 227, it was held :

"A second mortgagee who is a party to the *suit of a first mortgagee to enforce his mortgage*, is entitled to redeem the first mortgage and, on redemption, he becomes entitled to apply for a final decree for sale instead of the first mortgagee, or to receive his mortgage-money out of the surplus sale proceeds remaining in Court after satisfaction of the first mortgage on the ground that the same represent the security under his mortgage, the practical effect of either being to leave surplus proceeds to the second mortgagee towards a payment of his mortgage debt after satisfaction of the first mortgage.

Where a second mortgagee is not a party to the suit of the first mortgagee, he is not affected by the decree in the first mortgagee's suit, but is entitled to an opportunity of occupying the position which he would have occupied if he had been a party to the first mortgagee's suit and thus he has a right to sale of the property, subject to the rights of the first mortgagee, for his mortgage debts and to surplus sale proceeds in Court after satisfaction of the claim of the first mortgagee.

The reliefs are alternative and not cumulative, otherwise a security that can be satisfied by one of the reliefs, that is to say, by sale of the mortgaged property, will savour of a double security obviously beyond the ambit of the mortgage.

In such a case, a second mortgagee, when pursuing his claim in Court for alternative reliefs in an action, will have to elect which reliefs he will have in the action. He may, however, make the election in his pleadings and then he will be held to it. It follows that this will be so in all cases whether the surplus sale-proceeds in Court are sufficient to meet the mortgage debt of the second mortgagee or not".

Parties in suit by or against idol.—An idol is a juristic person in law. A suit by or against an idol should be framed as follows :—

"A B, an idol installed in the temple named as 'Krishna Mandir' at Banaras, through C D, the Manager or Shebait of the temple".

Parties in suit by or against math.—Suits by or against a math should be brought in the name of 'Mahant' of the math as "Ram, mahant of Math Krishna Gopal".

Decree against the Mahant binds also his successors.

Party in suit by or against Government.—Suits by or against the Central Government should be brought in the name of the "Union of India" and those by or against the State Government should be in the name of the State concerned. (Sec. 79).

Party in suit by or against Corporation.—In a suit by or against a Corporation, for instance a registered company, Municipal Board, University, the suit must be in the official name and style of the Corporation and not of its officer or agent *e. g.*, "The Municipal Board of Unnao"; "The University of Allahabad"; A. B. Company Ltd., having its registered office at 32, Mall Road at Kanpur". It is, however, advisable that when a suit is brought against such Corporation, it be added whether the suit is brought against it through the Secretary or the Agent, director or other principal officer. (O. XXIX, R. 1). This will lighten the difficulty in service of summons.

Party in suit by or against registered society.—In suits by or against registered societies, the suits should be brought in the name of their head or the Secretary, *e. g.*,

"A B, President of the Arya Sabha U. P., a society registered under the Societies Registration Act, 1860"

Party in suit by or against unregistered Associations.—In suits by or against unregistered associations like Clubs, Libraries, etc., the suits should be filed in the name of all the members of the Club or the Association. The reason is that the club or the association has no existence in law as such apart from its members. If the number of such members is sufficiently large, permission may, under Order I, Rule 8, be obtained to bring a representative suit.

Party in suit by or against Joint Hindu family.—Suits by or against a joint Hindu family should be either in the name of all the members composing it or in the name of the Manager as such, *e. g.*,—

"A, B, son of C, D, as Manager of joint Hindu family".

Party in suit by or against minor.—A minor may sue only through his next friend and not individually in his own capacity, and the title should be—

"A, B, son of C, D, a minor, by E F, son of X, Y, his next friend".

A minor may be sued only through his guardian The title should be—

A, B, son of C, D, a minor through his guardian G, H son of X, Y.

Joinder of parties liable on same contract.—The plaintiff may, at his option, join as parties to the same suit all or any of the persons severally, or jointly and severally, liable on any one contract, including parties to bills of exchange, hundis and promissory notes. (O. 1. R. 6).

In a suit on a contract, if the liability is several, several persons may be sued separately to the extent of separate liability of each or they may be sued jointly. But if the liability is joint or joint and several, the suit shall be for enforcement of the whole liability though the plaintiff is entitled to join all such persons or some of them. If some persons jointly liable or whose liability is joint and several are left out, then, according to Calcutta and Bombay High Courts, no separate suit lies against them but, according to the Allahabad and Madras High Courts, separate suit against such persons is not barred by the previous suit.

In a suit on tort where several persons jointly commit a wrong, the person injured may sue all or any one of them as he likes and may claim the whole relief from the same person but he cannot subsequently bring a suit against persons whom he has left out.

One person may sue or defend on behalf of all in same interest.—(1) Where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the Court, sue or be sued, or may defend, in such suit, on behalf of or for the benefit of all persons so interested. But the Court shall, in such case give, at the plaintiff's expense, notice of the institution of the suit to all such persons either by personal service or where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the Court in each case may direct.

(2) Any person on whose behalf or for whose benefit a suit is instituted or defended under sub-rule (1) may apply to the Court to be made a party to such suit. (O. I, R. 8).

Representative suit.—A suit filed by one or more on behalf of themselves and others having the same interest in the suit is called a representative suit. It is essential that the parties should have the same interest in the suit. The provisions in the Civil Procedure Code as to representative suits are contained in Order 1, Rule 8 and Section 91. Which are the exceptions to the general rule that all persons interested in a suit ought to be made parties to that suit.

The Court permits such suit for the sake of convenience when there is a large class of individuals having the same interest.

The general rule is that all persons interested in a suit ought to be joined as parties to it by name and served personally. Order 1, Rule 8 is an exception to this general rule.

The first essential for the application of Rule 8 is that the parties must be numerous. It should only be applied when the Court can fairly hold that the

parties are so numerous that it would not be convenient to implead all of them individually.

But where there are only 56 creditors all of whom are named in the a agreement and 55 of them have to be impleaded as defendants in each suit, this can be done conveniently and all of them served individually. In these circumstances, Rule 8 is not applicable to the suit.

Section 91 of the Code of Civil Procedure provides for *public nuisances*. It states that, in the case of public nuisance,—

(a) the Advocate-General, or

(b) two or more persons having obtained the consent in writing of the Advocate-General,

may institute a suit, though no special damage has been caused, for—

(i) a declaration and injunction, or

(ii) such other relief as may be appropriate to the circumstances of the case.

It further states that any right of suit which may exist independently of these above provisions, shall not be deemed to be limited or otherwise affected.

According to Professor Winfield, a *nuisance* is an unlawful interference with a person's use or enjoyment of—

(a) land, or

(b) some right over, or in connection with, it. (*Winfield* : Law of Torts, 4th Edition, page 436).

According to Clerk and Lindsell on Torts (1947), nuisance is an act or omission which is—

(a) an interference with,

(b) disturbance of, or

(c) annoyance to,

a person in the exercise or enjoyment of—

(a) a right belonging to him as a member of the public, *when it is a public nuisance* ; or

(b) (i) his ownership of land, or

(ii) his occupation of land, or

(iii) some easement, quasi-easement or other right used or enjoyed in connection with land,

when it is a private nuisance.

According to *Salmond on Torts*, 13th Edition, pages 233 and 234 :

"The pollution of a natural stream is a wrong actionable at the suit of any riparian owner past whose land the water so polluted flows, and pollution even of underground water is also actionable."

The term 'pollution' is here used in a wide sense to include any alteration of the natural quality of the water whereby it is rendered less fit for any purpose for which, in its natural state, it is capable of being used.

Thus it is actionable—

(a) to raise the temperature of the stream by discharging into it hot water from a factory, or

(b) to make soft water hard by discharging into the stream the water impregnated with lime, or

(c) to pollute the stream by pouring into it the sewage of a town or the chemical refuse from a factory.

Pollution is actionable without proof of actual damage. —The lower owner has a right to the continued flow of the stream in its natural quality, and any sensible alteration of this quality which renders the water less fit for any purpose is an actionable wrong even though the plaintiff has not, in fact, been prevented from making any use of the water which he has hitherto made or now desires to make of it. There is no right of "reasonable pollution."

According to Kerr's *Treatise on the Law of Practice of Injunctions*, 1927 Edition, pages 217 and 238 :

"A riparian owner is entitled to the flow of water past his land, in its natural state of purity undeteriorated by noxious matter discharged into it by others, and anyone who fouls the water infringes a right of property of the riparian owner who can maintain an action against the wrong-doer without proving that the pollution has caused him actual damage, and the action can be maintained even although other persons may have so fouled the water that the acts of the wrongdoer may not have rendered the water less applicable to useful purposes than it was before, for the damage is an injury to a right and, therefore, actionable.

An injunction will be granted—

(a) to restrain the fouling of a stream so as to render the water unfit for—

(i) domestic purposes ,

(ii) cattle to drink, or

(iii) fish to live in it, or

(iv) the purposes of manufacture ; and also

(b) to restrain the discharge of heated water into a stream or the pollution of a water supply by the escape of gas.

A riparian owner may maintain an action to restrain the pollution of a stream without proving that he has sustained actual damage by the wrongful act, and the fact that the stream has been fouled by other persons is no defence to the action."

In the case of *Wood v. Waud*, [1849) 3 Ex. 748: 18 L.J. Ex. 305, it was held that a riparian proprietor has a right to the natural stream of water flowing through the land in its natural state, and, if the water be polluted by a proprietor higher of the stream so as to occasion damage in law, though not in fact, to the first mentioned proprietor, it gives him a good cause of action against the upper proprietor unless the latter has gained a right by long enjoyment or grant.

Of couse, while, in the case of riparian owners, relief may be obtainable by the mere fact of the pollution even though there may not, in fact, be any sensible

inconvenience or reduction of the comforts of the riparian owner, in the case of persons who merely have a right over a property not belonging to them, the damage, in fact, would have to be proved.

In the above English case, the wrongful act of the defendant made no practical difference, that is, the pollution by the defendants did not make it less applicable to useful purposes than such water was before. But the Court held that, notwithstanding that, the plaintiffs have received damage in point of law, as they had a *right to the natural stream flowing through the land* in its natural state as an incident to the right to the land on which watercourse flowed as it was a case of an *injury to right*.

It may be that where one is not a riparian owner but has only a common right, actual damage may have to be proved.

In *Wood* v. *Sutcliffee*, [1851] 21 L. J. Ch. 253 = 18 L. T. (OS) 194, it was held that a person may, by long user, acquire a right to the water of a stream free from pollution, though he may have no proprietorship in the stream, and may acquire a right to pour polluted matter into a stream as against all new comers but a person, having established his right at law, is not, as a matter of course, entitled to an injunction, particularly where the injunction would not restore the plaintiff to the right he has established and where the act complained of may be compensated by pecuniary damages.

It may be pointed out that, in the above decision, the evidence proved that, owing to the increase of polluted matter poured into the stream from other sources than that of the defendant's works the plaintiff never could be re-instated in his original rights and that the damage might be compensated by money and that the plaintiff had been guilty of such an amount of acquiescence as would disentitle him to an injunction.

In the above decision, it was observed as follows :—

"Adverting to the conditions which must concur to induce this court to interfere, the first question which arises is whether, assuming that damage is done by the defendant's works, the restraining of that damage will restore, or tend to restore, the plaintiffs to that right which they had originally of having the water clean to their works.

Now, if it was only this—'there is somebody else fouling the water besides me'—the saying, that would be no defence to such an application, but, if, by reason of the whole change in the condition of the surrounding country and neighbourhood, the stream has become polluted to such an extent that it cannot be used for the purposes of the plaintiffs' works the granting of the injunction to restrain this one wrongdoer if he be such, from continuing his works would be no good to the plaintiffs. It will not do them that good, the doing of which is alone the ground on which a court of equity will use its strong power to interfere to restrain the defendant's works from going on.

If—

(a) notwithstanding a certain degree of pollution of the water, the plaintiffs can still use the water, although not so usefully, and then the defendant pollutes it to make it so much worse that they can use it in a less effective manner than they did before ; or

(b) the degree of pollution existing from Ripley's works may be prevented by the plaintiffs by the same process which they were using against Sutcliffee,

then, of course, they would have a right to say that this is a case in which an injunction would restore, or tend to restore, them to the rights which they originally had with regard to the stream.

Now, there is nothing to show from the evidence—

(a) how far the non-user of Ripley of that extent of pollution which they have of late years caused to this water ;

(b) how far, if they were away, the water is polluted by the other works (for there are a great many of them) ; or

(c) how far the pollution arising from those works would be so comparatively small as that the plaintiffs might continue to carry on their business effectively by using the water.

But the fact is that Ripley's increase of works has been comparatively recent. Then, were the plaintiffs, before the defendant's works came into operation, able to use the water of the stream for their works, either in the shape of using it —

(a) for washing wool, or

(b) in boilers ?

Clearly not.

Therefore, that affords a very strong ground for saying that the mere removal of the defendant's works, or preventing the defendant from carrying on his works in the manner in which he now does, really would not have the effect of causing the water of this stream to come down to the plaintiff's works in the same pure and unpolluted state, which the piaintiffs, according to their original right, ought to have."

In *Attorney General* v. *Gee*, (1870) 10 E. Q. 131, it was said :

"This brings us to the question whether the nature and extent of the nuisance in this case is such that this Court ought to interfere by injunction to prevent it.

It is not in every case of nuisance that this Court should interfere. It ought not to do so in cases in which the injury is merely temporary and trifling, but it ought to do so in cases in which the injury is permanent and serious, and, in determining whether the injury is serious or not, regard must be had to all the consequences which may flow from it.

The injury here is in the course of being abated in the manner pojnted out. The injury, when this information was filed, was not greater or different to what it had been 10 or 20 years before. Therefore, upon these grounds, there could not possibly be any advantage derived by interfering by injunction."

In *Lillywhite* v. *Trimmer*, [1867] 86 L. J. Ch. 525 = 16 L. T. 318, bill was filed to restrain a local board of health from discharging sewage into their river so as to be a nuisance and injury to the plaintiff. The Court found that the plaintiff sustained no material injury and that the nuisance, if any, had been to a great extent abated since the filing of the bill. The Court remarked that, in cases of this class where important public interests are involved, such

as the improvement of the drainage of a town, the Court will protect the private rights of the individual if affected in any material degree, but will at the same time have regard to—

(a) the nature and extent of the alleged injury or nuisance ; and

(b) the balance of inconvenience.

It may be pointed out that this case does not apply to a case where it is not the right of a local board that is involved and the action of the defendants is based on no manner of right whatsoever in the land.

Service by publication.—As is provided under Rule 8 rarely gives actual notice to all the interested persons except when they are members of—

(a) a well village community or

(b) a well-knit, religious caste or other group.

Problem.—The 10-year old son of the plaintiff was run over by a truck belonging to Beharilal and was killed. The suit was filed by the plaintiff for the recovery of damages against—

(i) Beharilal (the owner of the truck) ;

(ii) Lallu (the driver of the truck) ;

(iii) Jupiter General Insurance Co. (the Insurer of the truck) ; and

(iv) M/S. Prakash & Co. (the financier who advanced money for the purchase of the truck).

The Insurer (defendant No. 3) and the financier (defendant No. 4) filed separate written statements.

No written statement was filed on behalf of Beharilal (Defendant No. 1).

The Insurer filed an application to the Court for permission to defend the suit on behalf of, and in the name of, defendent No. 1. The Court, by an order, refused to allow it to defend the suit in the name of Beharilal (defendant No. 1).

The Insurance policy was for Rs. 20,000 but a sum of Rs. 30,000 was claimed as damages by the plaintiff.

The question for determination is whether the Insurer (defendant No. 3) should be allowed to defend the suit in the name of the Insured (defendant No. 1) as it is bound to meet the liability under the decree to the extent of Rs. 20,000.

Solution.—In *British India General Insurance Co. Ltd.* v. *Captain Itbar Singh*, A. I. R. 1959 S. C. 1331 : 1960 S. C. J. 44 : (1959) 29 Com. Cas. 60 ; (1960) 1 Andh. W. R. (S. C.) 6 ; (1960) 1 M. L. J. 6, it is mentioned that the insurer has the right, provided he has reserved it by the policy, to defend the action in the name of the insured. Such a right is conferred by condition No. 2 of the policy.

But if the insured is negligent in defending the suit and a right has been reserved by the policy enabling the insurer to defend the action in the name of the insured, then it should be allowed to do so under the inherent power of the Court under section 151, C. P. C.

The present case is a proper case in which such power should be exercised. The High Court will, in revision, allow the revision application, set

aside the order of the trial court and permit defendant No. 3 to defend the suit in the name of, and on behalf of, defendant No. 1.

Party in Representative suit.—Suits should be brought in some such way, as the case may be,—

"A, B son of X, Y, suing on behalf of himself and of all the Hindu residents of village Khaga."

Or

"A, B and C, D, Managing Trustees of the Kayastha Pathshala".

Or

"A, B son of C, D, as Manager of joint Hindu family."

Under section 91, *in the case of public nuisance*, the Advocate-General, or two or more persons having obtained the consent in writing of the Advocate-General, may file a suit for a declaration and injunction or for any other appropriate relief.

If the litigation is conducted *bona fide* in respect of such right, private or public, the decision in such representative litigation will operate as *res judicata* and bind all persons interested in the right claimed although they may not have been added as parties to the suit. [Section 11, Expl. VI].

Sub-rule (2) of Rule 10 of Order I states that the Court may, at any stage of the proceedings,—

> either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that—
>
> (a) the name of any party improperly joined (whether as plaintiff or defendant) be struck out ; and
>
> (b) the name of any person—
>
> (i) who ought to have been joined (whether as plaintiff or defendant) ; or
>
> (ii) whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit,
>
> be added.

A perusal of this provision of Rule 10 (2) shows that the Court is empowered, at any stage of the proceedings in a suit, to order that the name of any party which had been improperly joined to the suit, be struck out and the name of any other person who ought to have been joined or whose presence before the Court is necessary in order to enable it to effectually and completely adjudicate and settle all the questions involved in the suit, be added.

This rule does not deal with the substitution of parties but only with their striking out or addition. Therefore, by virtue of this provision, the name of the person whose presence, according to the Court, is necessary, has to be added as a plaintiff or a defendant in a suit which is *already pending*. A suit filed by a dead person or instituted against a dead person cannot be treated as a pending suit, because under such circumstances, it cannot be said that any person has filed a suit or a suit has been filed against any person. Under both contingencies,, therefore, the provisions of Rule 10 (2) cannot be utilised for adding a person as a party.

Therefore, where the suit has, admittedly, been filed against a dead person, because he had died long before the institution of the suit, the names of his legal representatives cannot be added to such a suit by taking recourse to the provisions of Rule 10 (2).

Section 82 (b) of the Representation of the People Act, 1951, lays down that a petitioner shall join, as respondent to his election petition, any other candidate against whom allegations of any corrupt practice are made in the petition. This makes it incumbent that any candidate against whom a charge of corrupt practice is made, must be joined as a party.

No doubt, the power of amendment is preserved to the Court, and Order 1, Rule 10 enables the Court to strike out parties, but the Court cannot use Order 6, Rule 17 or Order 1, Rule 10 to avoid the consequences of non-joinder for which a special provision is to be found in the Act. The Court can order an amendment and even strike out a party who is not necessary. But when the Act makes a person a necessary party and provides that the election petition shall be dismissed if such a party is not joined, the power of amendment or to strike out parties cannot be used at all. The Civil Procedure Code applies subject to the provisions of the Representation of the People Act and any rules made thereunder (See section 87). When the Act enjoins the penalty of dismissal of the election petition for non-joinder of a party, the provisions of the Civil Procedure Code cannot be used as curative means to save the petition.

The question is whether a single co-owner or co-sharer can institute a suit for recovery of possession without impleading other co-owners or co-sharers.

It may be stated that the decisions of the Patna High Court have generally proceeded upon the footing that—

(a) a co-owner can institute a suit for recovery of possession of land held by him along with other persons against a trespasser who dispossessed all the co-owners ; and

(b) he can obtain a decree for recovery of possession of the entire area but the judgment of the suit does not affect the rights of the other co-owners, which remain intact. (*Raghuraj Singh* v. *Bishen Tewary*, A. I. R. 1916 Pat. 26 : 37 I. C. 384 ; *Sambhu Gosain* v. *Piyari Mian*, A. I. R. 1941 Pat. 351 ; *Raju Roy* v. *Kasinath Roy*, A. I. R. 1956 Pat. 308 ; 1956 B. L. J. R. 249 ; *Dossain Naina* v. *Ramdeo Prasad*, A. I. R. 1957 Pat. 692). Therefore, a co-sharer's suit for recovery of possession of th entire area from a trespasser is maintainable. (*Ram Niranjan Das* v. *Loknath Mandal*, A. I. R. 1970 Pat. 1 (F. B.) : 1969 B. L. J. R. 176 : 1969 Pat. L. J. R. 96).

The suit by a co-sharer is competent if he sues for recovery of possession of land which is owned by him jointly with others, even without impleading the other co-sharers, (*Currimbhoy & Co . Ltd.* v. *L. A. Creet* A. I. R. 1930 Cal. 113 : I. L. R. 57 Cal. 170 ; *Ram Charan* v. *Bansidhar* A. I. R. 1942 All. 358 : I. L. R. (1942) All. 671 ; *Maganlal Dulabdas* v. *Bhudar Purshottam*, A. I. R. 1927 Bom. 192 : I. L. R. 51 Bom. 149 ; *Ahmad Sahib* v. *Magnesite Syndicate Ltd.*, A. I. R. 1915 Mad. 1214 : I. L. R. 39 Mad. 501, *Vinod Sagar* v. *Vishunbhai Shankar*, A. I. R. 1947 Lah. 388 ; *Biharilal* v, *Wasundarabai*, A. I. R. 1956 Madh. Bha. 35 ; *Ram Niranjan Das* v. *Loknath Mandal* A. I. R. 1970 Pat. 1 (F. B.) : 1969 B. L. J. R. 176 : 1969 Pat. L. J. R. 96). This view is based on sound principle in the sense that a co-sharer, with his title in equity, has a better claim to be in possession on behalf of

all the co-sharers than a complete trespasser. It is true, no doubt, that a trespasser, whose possession can be taken in law to be possessory title, cannot be disturbed in his possession by another trespasser, and as against the latter, he has a right to recovery of possession. It is well settled that merely a possessory title, when confronted with a better title, will yield place to the better title which must prevail over a trespasser's possessory title pure and simple. A co-sharer, having an interest in a property, jointly with others, is apparently a person with a better title than a trespasser. (*Ram Niranjan Das* v. *Loknath Mandal*, A. I. R. 1970 Pat. 1 (F. B.) : 1969 B. L. J. R. 176).

It is also a well settled principle of law that one of the various co-owners of a property, if in possession, will be deemed to be in possession on behalf of all the co-owners, and it is for this reason that his possession in law, therefore, is not regarded as adverse to other co-owners unless there is distinct proof of ouster. In this view of the matter, the interest of an undivided co-owner or co-sharer must be taken to cover every inch of land which may be the subject-matter of dispute as belonging to the co-owners. (*ibid*).

The houses of Vijairaj and Fatehraj on the one hand and of Suraj on the other abut one another at right angles. There is a Chabutri situated at the place where the two houses meet. This Chabutri was constructed by Suraj (plaintiff). Suraj brings a suit against the Municipal Council for a declaration that he is the owner of the Chabutri described in the plaint. The case of the plaintiff is that—

(a) it is a very old Chabutri.

(b) Vijairaj filed a complaint before the Administrator, Municipal Council alleging that the Chabutri was a new encroachment made by Suraj.

(c) After hearing the parties, the Municipal Commissioner held that part of the Chabutri was new and was an encroachment and ordered its demolition.

That order was subsequently set aside by the Revenue Appellate Authority.

(d) Vijairaj filed a Writ petition in the High Court on which the order of the Revenue Appellate Authority was set aside and the order of the Municipal Commissioner was restored. It was held that the Chabutri would be demolished unless Suraj took steps to have the order of the Municipal Commissioner set aside.

(e) The present suit is instituted by Suraj against the Municipal Council.

The case of Vijairaj and Fatehraj is that the Chabutri is constructed on Khalsa land and is an encroachment. They have further alleged that they had opened a door and window in their houses and they have a right of ingress and egress through the door on the Chauk outside the house and they have also a right of light and air through the window. It has not been stated how long the door and window have been in existence nor have they specified the ground on which they claim a right of ingress and egress through the door and a right to receive light and air through the window. The trial court passes an order refusing to implead them as defendants in the suit under Order 1, Rule 10 (2) C. P. C. on the ground that they do not claim any interest in the property in suit. It must be *held* that—

(i) Generally speaking, intervention can only be insisted upon in three classes of cases, namely,—

(A) In a representative action where the intervener is one of a class whom plaintiff claims to represent.

The intervener may say, 'I deny that plantiff represents me—Add me as a defendant.....'

(B) Where the proprietary rights of the intervener are directly affected by the proceedings.

(C) In actions claiming the specific performance of contracts, where third persons have an interest in the question of the manner in which the contract should be performed.

(ii) The main object of Rule 10 (2) is not to prevent multiplicity of action, even though it may *incidentally* have that effect. The Court has other ways of doing that which are amply sufficient for the purpose—by ordering consolidation.

The only reason which makes it necessary make a person a party to an action is so that he should be bound by the result of the action, and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party.

(iii) In the present case, no one can open doors and windows on Khalsa land as of right. Khalsa land means the land belonging to the State.

The applicants Vijairaj and Fatehraj have failed to show that they have any legal interest in the subject-matter of the suit. In other words, they have not shown that, if the plaintiff of the suit is granted the relief claimed by him, the legal rights of the applicants will be directly affected. It appears that the applicants want to be impleaded in the suit merely with the object of enabling them to see that it is properly defended, but the applicants cannot be impleaded as defendants for such a purpose.

(iv) The order of the trial Court is proper and legal.

Necessary parties.—The subject-matter of a *partnership suit* generally is—

(*a*) the severance of the jural relationship; and

(*b*) the determination of the mutual rights of the partners.

There being mutual agency and mutual obligation to render accounts, the position of parties in a partnership suit is, in some particulars, different from that of parties in an ordinary suit.

Each of the partners in a partnership suit, is really in turn plaintiff and defendant and in both capacities comes before the court for the adjudication of his rights or liability relatively to the other partners which the Court endeavours to determine by its decree. In such a suit, it is well established that a decree can go either in favour of the plaintiff against the defendant or in favour of any defendant or defendants against any other party or parties to the suit.

In a partnership suit, all the partners or their legal representatives must be made parties because all the parties necessary for the disposal of the subject matter of the suit, including taking of accounts, must be before the Court or the suit will fail. Proper and complete accounts cannot be taken as between some only of the partners.

The necessary corollary of this is that, if a necessary party has been omitted and added at a time when the suit against him is barred, the whole suit will be dismissed. The same consideration must apply where, in a partner-

ship action by a partner against his other partners, the claim is barred against some of those partners but the bar of limitation is saved against some or other partners by virtue of any acknowledgment and this is for a simple reason that when accounts are taken in any such suit, all the partners would not be before the court. (*Yakub Ibrahim v. A. Gulamabbas*, A. I. R. (1958) Bom. 51 = I. L. R. (1957) Bom. 871).

This decision lays down that, in a partnership suit, all the partners or their legal representatives must be made parties because all the parties necessary for the disposal of the subject-matter of the suit including taking of accounts must be before the court or the suit will fail.

In the decision of the Gujarat High Court in *Second Appeal No. 996 of 1960* decided on 14-3-1967, Bakshi J., had to deal with a similar question. It was contended before the learned Judge by Mr. Patel the counsel that—

(*a*) Respondent No. 4 (original defendant No. 4) was dead during the pendency of this appeal and the appellant had taken no steps to join the legal representatives of defendant No. 4 ; and

(*b*) Respondent No. 7 (original defendant No. 7) was also deleted as a party to this appeal by the appellant, and the appeal cannot proceed in absence of the legal representatives of respondent No. 4 and in absence of respondent No. 7.

It was *held* by the learned Judge that—

Both the contents of Mr. Patel must be upheld.

The suit is a suit for dissolution of partnership and in proceedings relating to partnership, all partners or their legal representatives must be made parties as all the parties necessary for the disposal of the subject-matter of the suit must be before the court. If, therefore, such a necessary party as a partner has been omitted, the proceedings against him would be barred and the whole suit would be liable to be dismissed.

In a suit for dissolution and for taking accounts of partnership, the shares of each of the partners have to be determined and the accounts of each of the partners would require to be settled. It is possible that a partner might be found to be a creditor or a debtor according to the result of the accounts when they are settled and, if any one who is such a necessary party as a partner has not been brought before the court, such *a suit, in the absence of the partner, can not legitimately be proceeded with.*

In the case before us, respondent No. 4 who was a partner, is dead and his legal representatives have not been joined. Similarly, respondent No. 7 was also a partner in the firm and his name has been deleted from the parties to the appeal. The decision of the District Judge cannot, therefore, be disturbed so far as they are concerned.

In the circumstances, it would not be possible to take accounts of the partnership even if the appellant succeeds in this appeal, therefore, This appeal cannot be legitimately proceeded with in the absence of the legal representatives of the respondent No. 4 and in the absence of respondent No. 7.

The appeal must, therefore, be dimissed for that reason."

The case of *Gajanand* v. *Sardarmal*, A. I. R. 1961 Raj. 223 : I. L. R. (1961) 11 Raj 354, was a case where the suit was not instituted in the

name of the firm, but in the name of individual partners, the firm being a foreign firm. In this case, after the institution of the suit, one of the plaintiffs died and his legal representatives were not brought on the record. The question for consideration under Order 22, Rule 2 was whether the right to sue survives to the surviving plaintiffs alone, that is, whether the surviving plaintiffs are competent to carry on the suit in the absence of the deceased plaintiff without joining the legal representatives of the deceased as plaintiffs or defendants or whether the remaining plaintiffs are entitled to represent the deceased plaintiff for purpose of prosecuting the suit. The suit was a suit to recover the debt due to the firm. It was *held* that under section 47 of the Partnership Act, after the dissolution of a firm, the remaining partners may represent the dissolved firm including the interest of the deceased partner to recover any debt due to the firm, and, therefore, they may be taken to represent the deceased partner in a *suit for recovery of any amount due to the firm.*

In *State of Punjab* v. *Nathu Ram*, A. I. R. 1962 S.C. 8 : (1962) 2 S. C. R. 636 : (1961) 2 S. C. J. 637 : (1962) 1 Andh. L. T. 306 : (1961) 2 Andh. W. R. 182 : (1961) 2 Ker. L. R. 548 : (1961) 2 M. L. J. 182, which was not a case of partners, certain land belonging to two brothers L and N jointly was acquired for military purposes and, on their refusal to accept the compensation offered by the Collector, the State Government referred the matter for inquiry to an arbitrator under Rule 10 of the Punjab Land Acquisition (Defence of India) Rules, 1943. The arbitrator passed a joint award granting a higher compensation and also certain sum on account of income-tax. The State Government appealed against the award to the High Court. During the pendency of appeal, L died and his legal representatives were not brought on record and the appeal abated against him.

The question was whether the appeal also abated as against N. It was *held* by the Supreme Court that *the appeal against N alone cannot proceed.* To get rid of the joint decree, it is essential for the appellant State to implead both the joint decree-holders and, in the absence of one, the *appeal is not properly constituted.* The subject-matter for which the compensation had been awarded, was one and the same land and the assessment of compensation, so far as L was concerned, having become final, there cannot be different assessments of compensation for the same parcel of land. The mere record of specific shares of L and N in the revenue records is no guarantee of their correctness and the appellate Court would have to determine the share of N and that of L in the land in the absence of L's legal representatives which is not permissible in law.

Problem.—One P made a number of sales of separate parcels of land in favour of different vendees on different dates. Out of these two sales were made in favour of G. D and two others who were the sons of P, brought a suit in *forma pauperis* challenging those alienations including those two also, for a declaration that the alienations are without consideration and, consequently, not binding on the reversionary rights of the plaintiffs, as the properties alienated are ancestral ones. In this suit, G was impleaded as defendant No. 4. While the enquiry as to the pauperism of the plaintiffs was proceeding the plaintiffs filed an application to the effect that G was already dead when the suit had been filed by them and that fact was not within their knowledge. It was prayed that his sons, Dass and Mal be, therefore, substituted in place of G deceased. Notice of this application was given to the sons of G and they filed a written statement and therein took the plea that G had already died and since the suit was brought against a dead person, it was a nullity and, as such, was liable to be dismissed. The trial court framed the issues and found that—

(a) G had died before the institution of the suit, with the result that his name has to be struck off from the array of defendants.

(b) Dass and Mal should be brought on the record as defendants in place of G under the provisions of O. 1, rule 10 (2).

According to the trial court, the plaintiffs have before the suit was formally registered after the pauper application had been decided, brought an application for the substitution of their names in place of G, and the circumstances of the case show that the presence of Dass and Mal in the suit is necessary in order to effectively and completely adjudicate upon and settle all the questions in suit.

As a result of these findings, the trial Court ordered that the name of G (defendant No. 4) be struck off and in his place, the names of Dass and Mal, be added as defendants.

The question is whether this order of the court is valid and justified.

Solution.—The plaintiffs have challenged a number of alienations of separate parcels of land in favour of different vendees on different dates. In other words, a number of suits challenging the various alienations have been combined into one, as if each alienation gave a separate cause of action to the plaintiffs. So far as the two alienations are concerned, the suit could be instituted only against G (the sole vendee). He was, however, dead at the time of the institution of the suit. Therefore, it is not a case where there were a number of defendants against whom one common cause of action had accrued to the plaintiffs.

Where several defendants have been impleaded in a suit because different causes of action have accrued against them and the sole defendant against whom there was an independent cause of action was dead at the time of the filing of the suit, his legal representatives cannot be added as defendants under Order 1, Rule 10 (2).

It is admitted by both the parties that when the plaintiffs filed the application for impleading the legal representatives of G as defendants in the suit, the limitation for challenging the two alienations made in favour of G had not run out, and an independent suit could be brought by the plaintiffs against Dass and Mal on the date of making that application. There is then no point in rejecting the plaintiffs' application and compelling them to file a separate suit against Dass and Mal for challenging the two alienations. In order to avoid multiplicity of litigation and do substantial justice between the parties, the court could have *substituted the names* of Dass and Mal in place of their father G under the provisions of section 153, C. P. C., when, concededly, the limitation for filing an independent suit against them was still there. The suit in respect of these alienations would be deemed to have been instituted against Dass and Mal on the date of making for impleading the legal representatives of G as defendants.

It is true that the plaintiffs have not made the said application under section 153, C. P. C., but this does not make any difference. As a matter of fact, it had not been stated in the application as to under what provisions of law the same had been made. The Court can *suo motu* take action under section 153, C. P. C., and implead Dass and Mal as defendants in the suit in place of their deceased father G.

This view is supported by a number of decided cases of various High Courts.

In a Full Bench decision of the Madras High Court in the case of *Gopalkrishnayya* v. *A. Lakshmana Rao*, A. I, R. 1925 Mad. 1210 (F.B.) : I. L. R. 49 Mad. 18, it was observed :

"If an appeal is presented against a person who was dead at the date of presentation, the Court may, under Section 153,—

(a) permit the cause title to be amended, or
(b) return the appeal memorandum for amendment and representation.

Although the appeal may be incompetent owing to the wrong person being named as respondent the Court which deals with it, is acting in a proceeding in a suit and, as such, has full power under section 153 to direct an amendme t of the appeal memorandum."

Similarly, in *Kannangara Ismail* v. *P. K. Pavu Amma*, A. I. R. 1955 Mad. 644 (1955) 2 M. L. J. 184, a suit was filed against certain defendants who were dead at the time of filing it. The Court, in ignorance of that fact and on the assumption that they were alive on the date of the suit, ordered their legal representatives to be brought on record on the application of the plaintiff. The suit was not time-barred as against the legal representatives on the date of application for impleading them as legal representatives. A decree was passed against these new defendants. It was *held* that the plaint could be considered as freshly instituted against the new defendants on the date when the application for impleading them was filed and hence the decree could not be said to be void *ab initio*.

In the case of *Jagarnath Raut* v. *Commissioners of Buxar Municipality*, A. I. R. 1961 Pat. 480 (D.B.), the Division Bench of the Patna High Court followed the Full Bench decision of the Madras High Court in *Gopalakrishnayya's case*, quoted above, and observed as follows :—

"A suit cannot be instituted against a dead person.

But where such a suit is instituted, Section 153, C. P. C., gives sufficient authority to the Court to allow amendment of the plaint within the period of limitation upon the application of the plaintiff to implead the legal representatives of the deceased defendant as party defendants, provided the suit is not barred by limitation against them on the date of the application.

The true legal position is that the Court is treating the amendment petition as if it is a new plaint presented against new parties on the date on which the application for amendment is made."

In *C. Raju* v. *Dinshaji Dadabhai Italia*, A. I. R. 1961 A. P. 239 : 1960 Andh. L. T. 1020, it was *held* that—

(a) Where, in a suit originally filed against father and his son as surety, it subsequently transpires that the father was dead before the institution of the suit, it is open to the Court upon the application of the plaintiff, to implead the legal representatives of the deceased defednant as party defendants, if the suit is not barred by limitation against them on the date of the application.

b) The terms of Section 153 are sufficiently wide.

(c) A suit instituted against a dead person cannot be regarded as a suit against a wrong person.

(d) Under Section 153, the legal representatives can be impleaded as parties. There is nothing to prevent the Court from construing the plaint as if it was filed against new parties on the date on which the application for amendment was made.

In view of the above, the order passed by the trial Court can be sustained because action taken therein can be justified under the provisions of Section 153 of the Code of Civil Procedure.

Section 153 of the Code of Civil Procedure deals with *general power to amend*. It lays down that the Court may,—

(a) at any time ; and

(b) on such terms as to costs or otherwise, as it may think fit,

amend any defect or error in any proceeding in a suit,

and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding.

Thus, very wide powers are given to the Court to amend any defect or error in any proceeding in a suit by making the necessary amendment for determining the real question or issue between the parties.

The *object* of this rule allowing amendments is—

(a) to minimise litigation,

(b) to avoid multiplicity of proceedings, and

(c) to see that the technicalities may not be allowed to stand in the way of substantial justice.

Effect of substituting or adding new plaintiff or defendant.—1. The proceedings as against any person added as defendant are deemed to have begun only on the service of the summons. [O. I, R. 10 (5)].

2. Where, after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit, as regards him, is deemed to have been instituted when he was so made a party.

But where the Court is satisfied that the omission to include a new plaintiff or defendant was due to a mistake made in good faith, it may direct that the suit, as regards such plaintiff or defendant, shall be deemed to have been instituted on any earlier date.

These provisions do not apply to a case where—

(a) a party is added or substituted owing to assignment or devolution of any interest during the pendency of a suit ; or

(b) a plaintiff is made a defendant ; or

(c) a defendant is made a plaintiff. (Section 21 of the Limitation Act, 1963).

Misjoinder and non-joinder of parties.—Order 1, Rule 9 of the Code of Civil Procedure lays down that—

(a) no suit shall be defeated by reason of the misjoinder or non-joinder of parties ; and
(b) the Court may, in every suit, deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

A suit, therefore, does not necessarily fail for misjoinder or non-joinder of parties to the suit.

Misjoinder of parties.—Misjoinder means joinder of a party who ought not to have been joined either as plaintiff or defendant, or joinder of a person as plaintiff who should have been joined as defendant and *vice versa.*

Misjoinder of parties may be misjoinder or plaintiff or misjoinder of defendant.

Non-joinder of parties.—Non-joinder occurs when a necessary party is not joined as such.

Necessary party.—Cases may arise where it is not possible for the court to give relief in the absence of certain parties. Such parties are called *necessary parties* to a suit, in whose absence the court may not adjudicate upon the right in dispute. For example, all partners must join in a suit for partnership account and, in the absence of them, the suit cannot proceed.

The provisions of Order 1, Rule 9 show that, if the court can deal with the matter in controvery so far as regards the rights and interests of the appellant and the respondents other than the deceased respondent, it has to proceed with the appeal and decide it. It is only when it is not possible for the Court to deal with such matters, that it will have to refuse to proceed further with the appeal and therefore dismiss it.

The question whether a court can deal with such matters or not, will depend on the facts of each case and, therefore, no exhaustive statement can be made about the circumstances when this is possible or is not possible. It may, however, be stated that ordinarily the considerations which weigh with the Court in deciding upon this question, are whether the appeal between the appellants and the respondents other than the deceased can be said—

(a) to be properly constituted, or
(b) to have all the necessary parties,

for the decision of the controversy before the court.

The test to determine this has been described in diverse forms. Courts will not proceed with an appeal when—

(a) the success of the appeal may lead to the Court's coming to a decision which will be in conflict with the decision between the appellant and the deceased respondent and therefore which would lead to the Court's passing a decree which will be contradictory to the decree which had become final with respect to the same subject matter between the appellant and the deceased respondent ;

(b) the appellant could not have brought the action for the necessary reliefs against those respondents alone who are still before the court ; and

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(c) the decree against the surviving respondents, if the appeal succeeds, will be ineffective, that is to say, it could not be successfully executed.

Proper party.—Where the case is such that the parties omitted are not necessary for complete and effective adjudication of the point in dispute, the suit may proceed notwithstanding the absence of such party. Such party is called *proper party*. The reason is that the Court may deal with the matter in controversy so far as the parties before it are concerned.

Procedure for removal of defect of misjoinder or non-joinder of parties.—The defect of misjoinder or non-joinder of parties can be removed in any of the following ways :—

(1) **By application for amendment by the plaintiff.**—The plaintiff may apply to the court for amendment of the plaint so as to remove the defect. The court has wide discretion to order such amendment at any stage of the proceedings on such terms as to costs, etc., as it thinks fit to impose.

(2) **By the Court acting** *suo motu*.—The Court can remove the defect on its own motion. This can be done in the following manner :—

(a) This is done particularly when the absence of a party is considered as proper to effectively and completely adjudicate upon the suit, that is, in the case of proper parties.

The Court may do so even against the wishes of the plaintiff but it should not do if the addition would mean importing of unnecessary and complex questions foreign to the issues.

(b) In addition to this, the Court can order substitution or addition of plaintiffs under Order 1, Rule 10 when—

(i) the omission or mistake is due to a *bona fide* mistake ; and

(ii) the amendment is necessary for determining the real matter in dispute.

Both these conditions must be satisfied in order that the court may exercise power under this provision. For example, in a suit brought by a firm it is found that the plaint was not signed or verified by one of the partners of the firm as required by Order XXX and that the error was *bona fide*, it may be ordered to be rectified.

(c) Apart from these, the court has inherent power to order substitution or addition of parties at any stage of the suit if it thinks it necessary to do so to secure the ends of justice. (Sec. 151).

(3) **By application on behalf of third parties called intervenors** —If the intervenor is a necessary party to the suit he must be joined but if not, the court has to exercise its discretion whether to add or not to add him as a party. If the addition of such third party would cause much inconvenience or embarrassment to the plaintiff, if he is not directly interested in the matter in suit or if the third party claims adversely to both the plaintiff and the defendant thus necessitating a traingular contest, he should not be allowed to be added as a party.

Objection as to non-joinder or misjoinder.—All objections on the ground of non-joinder or misjoinder of parties shall be taken—

(a) at the earliest possible opportunity ; and

(b) in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen.

Any such objection not so taken is deemed to have been waived. (O. I, R. 13).

In this connection, Rule 2 of Order 8 may also be remembered.

In the case of the Judicial Committee of the Privy Council in *Dhurm Das Pandey* v. *Mt. Shama Soondari Dibiya*, [1843] 3 M. I. A. (P. C.) 229=6 Suth. W. R. 43, what happened, amongst other things, was that, pending the suit, an act of adoption was executed by the respondent (the plaintiff mother) whereby the whole property was divested from the mother and vested in her adopted son. An objection on that score was taken for the first time before the Board. It was said that the decree put the respondent in possession, in her own right of that which was divested from her by the act of adoption. Lord Campbell, delivering the advice of the Board, met this objection in the following two ways :—

1. No objection was made in either of those Courts (the Zila Court and the Sudder Dewani Court) that proper parties were not before the Court. If such an objection had been made, it might have been removed, and it is a safe maxim for a Court of Appeal to be governed by the principle that an objection which, if taken, might have been cured and which has not been taken in the Court below, shall not be taken in the Court of Appeal.

2. The decree, not very skilfully framed, is to be considered as a decree putting the respondent in possession as the adopted son's guardian and trustee.

Rule 13 of Order 1 has no application to a case where a necessary party to the suit is not before the court and no effective decree can be made in the absence of such a party. The suit in such cases is inherently defective and the point can be taken at any stage, provided no new facts have to be alleged or proved. (*Chandra Mohan Saha* v. *Union of India*, A. I. R. 1953 Assam 193 (F. B.)=I. L. R. (1953) 5 Ass. 326).

Appearance of one of several plaintiffs or defendants for others.—Where there are more plaintiffs than one, any one or more of them may be authorised by any other of them to appear, plead or act for such other in any proceeding.

Where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.

The authority should be in writing signed by the party giving it and should be filed in Court. (O. I, R. 12).

Reliefs claimed against defendants.—It shall not be necessary that every defendant shall be interested as to all the reliefs claimed in any suit against him. (O. I, R. 6).

Powers of Court

Power of Court to order separate trials.—Where it appears to the Court that any joinder of plaintiffs may embarrass or delay the trial of the suit, the Court may—

(a) put the plaintiffs to their election ; or

(b) order separate trials ; or

(c) make such other order as may be expedient. (O. I, R. 2).

Where it appears to the Court that any causes of action joined in one suit cannot be conveniently tried or disposed of together, the Court may—

(a) order separate trials ; or

(b) make such other order as may be expedient. (O. 2, R. 6).

Court may give judgment for or against one or more of joint parties.—Judgment may be given without any amendment—

(a) for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to ;

(b) against such one or more of the defendants as may be found to be liable, according to their respective liabilities. (O. I, R. 4).

Conduct of suit.—The Court may give the conduct of the suit to such person as it deems proper. (O. I, R. 11).

CHAPTER III

FRAME OF SUIT

Frame of Suit.—Every suit shall, as far as practicable, be framed so as—

(a) to afford ground for final decision upon the subjects in dispute; and

(b) to prevent further litigation concerning them. (O. 2, R. 1).

The words "*subjects in dispute*" do not mean the *corpus* or subject-matter of the claim but they mean "the jural relation between the parties to the suit for the determination of which the suit is brought". (Vide *Ramaswami* v. *Vythimatha*, 26 Mad. 760 at p. 766). The plaintiff need not (though he may) combine all causes of action which he may have against the defendant in respect of the *corpus* of the suit. For instance, B is a tenant of A and has been in arrears and has also incurred liability for ejectment. A may sue for arrears and he is not required to sue for ejectment of the same suit, though he may do so if he likes. But while suing for arrears, he must include in the suit all grounds therefor. If a plaintiff can claim a property on more than one separate ground, he should allege all those grounds in the plaint and if he does not, the dismissal of his suit on the ground or grounds urged will bar a separate suit on the other ground. That is the reason why a suit must be so framed as to afford ground for final decision. In view of Explanation IV to Section 11 of C. P. C., the plaintiff shall stand debarred from bringing a fresh suit on grounds left out.

In *31 Madras 385*, a suit for possession as reversioner on the ground of a certain relationship was dismissed and a subsequent suit for possession as reversioner on the ground of another relationship was held barred.

Suit to include the whole claim.—Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the *cause of action.*

But a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any court. (O. 2, R. 2 (1)).

Sub-rule (1) above makes it incumbent on the plaintiff to include the whole of his claim in his action.

If the plaintiff was aware of the claim and omitted to sue in respect thereof, he cannot afterwards sue in respect thereof, though the omission was accidental or involuntary. The rule that "every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action" is founded on the *principle* that a man should not be vexed twice for one and the same cause and is directed to securing the exhaustion of the relief in respect of a cause of action and not to the inclusion in one and the same action, different causes of action, even though they arise from the same transaction.

One transaction may give rise to several causes of action and the plaintiff may bring as many suits as there are causes of action but not more than one suit can be brought in respect of a single cause of action. The plaintiff should include the whole of the claim in respect of a cause of action.

Instances of claims arising under the same cause of action.—The following claims cannot be split up and should be united in the same suit—

(1) Suit for specific performance and the claim for earnest money deposited with the defendant.

(2) Suit for damages for part of goods not accepted and price of part of goods accepted.

(3) Claims for possession and claims for *mesne profits* upto the time of delivery of possession.

Instances of separate causes of action.—The following are instances of separate causes of action which can be sued for separately :—

(1) Claim on a promissory note and the claim on the basis of original consideration after the promissory note was held to be unenforceable on account of material alterations

(2) Claim by a reversioner to challenge the validity of one alienation by a Hindu widow and similar suit in respect of another alienation.

(3) Suit for dissolution of partnership and the claim for accounts of partnership.

(4) Suit for ejectment on ground of non-payment of rent and the claim for arrears of rent.

Relinquishment of part of claim.—Where a plaintiff—

(a) omits to sue in respect of any portion of his claim, or

(b) intentionally relinquishes any portion of his claim,

he shall not afterwards sue in respect of the portion so omitted or relinquished. (O. 2, R. 2 (2)).

Whether a party has relinquished part of its claim or not, is a question of fact which has to be determined on the basis of evidence to be produced in the case.

In the case of *Mohammad Hafiz* v. *Mirza Mohammad Zamariya*, A. I. R. 1922 P. C. 23, the mortgage deed provided that if the interest was not paid for 6 months, the creditor should be competent to realise either the unpaid amount of interest due to him or the amount of principal and interest by bringing a suit in court without waiting for expiration of the time fixed. The plaintiffs more than 3 years after the time fixed brought a *suit for interest alone* and got a decree. It was *held* that, under the circumstances, the creditor must be deemed to have relinquished his claim for further relief and that he having exercised the option of suing for interest alone, *a second suit for principal and arrears of interest* was not maintainable.

It may be pointed out that, in this case, it was possible for the plaintiffs to have obtained a relief or a decree for the principal and arrears of interest exactly on the same allegation in which the suit for part of interest alone was brought and decree obtained. The causes of action for the two suits were the same.

The Privy Council in the above case also observed that :

> "the cause of action referred to in the rule is the cause of action which gave occasion to and forms the foundation of the suit and that

cause enables a man to seek for larger and wider reliefs than to which he limits his claim. He cannot afterwards seek to recover the balance by independent proceedings."

So the cause of action for a declaration in the earlier suit, viz., that the defendants were threatening to take possession, could never have enabled the plaintiffs to obtain a wider relief for possession.

The case of *Naba Kumar Hazra* v. *Radhe Syam Mahish*, A. I. R. 1931 P. C. 229, also laid down that *relief for rent and profits* which could have been prayed for in the *previous suit for conveyance of properties* and arising out of the *same cause of action*, cannot be prayed for in a subsequent suit. Their Lordships of the Privy Council observed as follows :—

"It is equally clear that this relief could have been claimed in the previous suit.

They evidently claimed this relief in the trial court, but the subordinate Judge thought that as there was no appropriate prayer in the plaint, he could not grant it.

The respondant went to the High Court on the contention that the subordinate Judge was wrong and that he ought to have ordered the conveyance of the properties. The High Court accepted this contention and granted the relief which the respondents so sought. If this was right, and their Lordships have no doubt that it was, it is obvious that the respondents could also have claimed an account of the rents and profits, and, not having done so, or having abandoned the claim, they cannot seek this relief in a subsequent suit."

It is clear from the aforesaid quotation that their Lordships of the Privy Council were of opinion that the *relief for accounts* could also have been claimed on the basis of the allegations made in the earlier plaint and, that being so, a subsequent suit for accounts would be barred under Order 2, rule 2.

Order 23, Rule 1 (1) of the Civil Procedure Code provides that, at any time after the institution of a suit, the plaintiff may abandon a part of his claim. The plaintiff is, therefore, within his right to abandon a part of his claim. This does not require any amendment of the plaint or any permission of the Court. The plaintiff can do so voluntarily by a unilateral act of himself. The plaintiff can make a statement to the Court and the Court would normally record the statement and proceed to try the suit with regard to the remaining part of the claim. (*Mrs. Shobhavenkat Rao* v. *K.R. Mahale*, A. I. R. 1969 Bom. 370 (S. J.) : I. L. R. (1968) Bom. 1397 : 71 Bom. L. R. 35 : 1969 Mah. L. J. 328). Order 2, Rule 2 (2) is not the only provision in the Code of Civil Procedure for voluntary relinquishment of claims or parts of claims. Before the Court has passed an order returning the plaint for presentation to the proper Court, it is open to the plaintiff to abandon any part of her claim under O. 23, R, 1 (1) C. P. C., so as to bring it within the jurisdiction of the Court. In such event, it is not necessary for the Court to return the plaint to the plaintiff for presentation to the proper Court. (*ibid*).

Omission to sue for one of the reliefs.—A person entitled to more than one relief in respeet of the same cause of action may sue for all or any of such reliefs.

But if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

Explanation.—For the purposes of this rule, an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.

Illustration

A lets a house to B at a yearly rent of Rs. 1,200. The rent for the whole of the years 1905, 1906 and 1907 is due and unpaid. A sues B in 1908 only for the rent due for 1906.

A cannot afterwards sue B for the rent due for 1905 or 1907. (O. 2, R. 2 (3)).

The above sub-rule (3) makes it incumbent on the plaintiff to ask for the whole of his remedies.

Their Lordships of the Privy Council in the case of *Mohammad Khalil Khan* v. *Mahboob Ali Mian*, A. I. R. 1949 P. C. 78, laid down *certain principles* for determining whether—

(a) the case falls under O. 2, Rule 2 ; and

(b) the claim in a new suit is in fact founded upon a cause of action distinct from that which was the foundation for the former suit.

Their Lordships held that—

(i) The cause of action means every fact which will be necessary for the plaintiff to prove if traversed in order to support his right to the judgment.

(ii) If the evidence to support the two claims is different, then the causes of action are also different.

(iii) The cause of action has no relation whatsoever to the defence that may be set up by the defendant.

(iv) The cause of action does not depend upon the character of the relief prayed for by the plaintiff.

(v) The cause of action refers to the media upon which the plaintiff asked the court to arrive at a conclusion in his favour.

Applying the above test for determining whether the causes of action in the two suits are the same or not, where the facts which the plaintiff had to prove in order to succeed in the previous declaratory suit, was that the defendants in that suit were threatening to take possession whereas the fact which the plaintiffs have to allege in the subsequent suit for possession, is that the defendents are in possession and therefore the court should pass a decree for possession, these two facts cannot be said to be the same. It necessarily follows that the evidence in support of the two claims would also be different. It is immaterial whether, in the earlier suit, the defendants were able to show that they had obtained possession. Thus the view is that the cause of action in a *suit for possession* is different from the one in a *suit of declaration of title.*

In the case of *Radha Gobinda Roy* v. *Sri Nilkanth Narayan Singh*, A. I. R. 1951 Pat. 556, it was held that a plaintiff is not bound to seek all the remedies open to him. If he omits to sue for any particular relief *arising out of a cause of action*, he will at most forfeit his right to sue afterwards in respect of that relief.

Subsequent suit for possession whether barred by former suit for declaration.—Order 2, Rule 2, provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action, and that if a person is entitled to more than one relief in respect of the same cause of action, he may sue for all or any of such reliefs, but, if he omits, except with the leave of the court, to sue for all such reliefs he shall not afterwards sue for any such relief so omitted.

It will, therefore, have to be seen whether the cause of action on the basis of which declaration was sought for in respect of property in a previous suit, is the same as the cause of action for claiming possession over that property in a subsequent suit.

If the two causes of action are the same, the subsequent suit would be barred, as the plaintiff did not include the relief of possession while seeking the relief for declaration in former suit.

On the other hand, if the causes of action for seeking relief for declaration in the previous suit and for possession in the subsequent suit are not the same, no question of bar of Order 2, Rule 2 will arise.

In the Allahabad Full Bench case of *Darbo* v. *Kesho Rai*, I. L. R. 2 All. 356 (F. B.), the plaintiff, on the death of her husband, sued Kesho Rai for a declaration of title to succeed as her husband's heir to certain property. The court of first instance dismissed the suit on the ground that the plaintiff was not in possession of a large portion of the property and should, therefore, have sued for possession. The plaintiff subsequently filed another suit against Kesho Rai for possession over the property. The court of first instance held that the claim was barred under the provisions of section 7 of Act No. VIII of 1859. On appeal, a Full Bench of the Allahabad High Court, consisting of four Judges, *held* that, in so far as the appellant claimed possession of the property for which she formerly claimed a declaration of title, the present suit was clearly not barred.

Section 7 of Act VIII of 1859, like Order 2, rule 2, C. P. C., provided that every suit was to include the whole of the claim arising out of the cause of action, and, if a plaintiff relinquished or omitted to sue for any portion of the claim, a suit for the portion shall not be entertained afterwards.

It is, therefore, clear that the Allahabad High Court was of the opinion that a suit for declaration is not based on the same cause of action as a suit for possession.

Again, in the Full Bench case of *Ram Sewak Singh* v. *Nakched Singh*, I. L. R. 4 All. 261 (F. B.), certain persons brought a suit for declaration in respect of their proprietary rights in certain estate and they wish to have a gift set aside. The court trying the suit dismissed it on the ground that it was barred by section 42 of the Specific Relief Act, 1877. The court held that the plaintiff had omitted to sue for possession although they were not in possession and were able to sue for it. These persons thereafter filed fresh suit claiming possession of the estate to the extent of their share. It was *held* by the majority of the Full Bench that the causes of action in the the two suits being different, a second suit was not barred by the provisions of section 43 of the Civil Procedure Code.

It may be mentioned that provisions of section 43 of the Civil Procedure Code of 1877 are similar to the provisions of Order 2, rule 2 of the present Code of Civil Procedure of 1908.

This Full Bench case, therefore, is a clear authority for the proposition that the cause of action in a suit for declaration of title is different from the cause of action in a suit for recovery of possession.

In another Full Bench case of *Sarsuti* v. *Kunj Behari Lal*, I. L. R. 5 All. 345 (F. B.), the Allahabad High Court held that a suit for possession was not barred under section 7 of Act VIII of 1859, even though the claim for declaration of right had been granted in an earlier suit and in which a decree for possession had not been claimed. The Full Bench relied upon the following cases :—

(i) *Darbo* v. *Kesho Rai*, I. L R. 2 All. 356 (F. B.).

(ii) *Kalidhun Chatturpadhya* v. *Shiba Nath*, I. L. R. 8 Cal. 483.

In the case of *Ram Charan* v. *Tulsi Ram*, A. I. R. 1929 All. 306, Mr. Justice Mukherji observed as follows :—

"The earlier *suit* was brought *to obtain the cancellation of the alleged deed of gift* and the suit was in the nature of a declaratory one.

It is true that the defendants in the earlier suit did plead that they were in possession and had been put in possession by virtue of the deed of gift by Durga Prasad himself.

It further follows that the defendants obtained possession either in the teeth of Durga Prasad's opposition or on his death.

The question then would be whether the fact that the defendants obtained possession, would alter the original cause of action or whether it should be taken that the causes of action for the two suits are one and the same.

Where, however, the former suit is one for pure declaration and the second suit is for possession, I am of opinion that it must be taken that the two causes of action are different."

Similarly, Mr. Justice Niamatullah observed as follows :—

"The suit out of which the present appeal has arisen, is based on a different cause of action and has a different object in view. The immediate desire of the plaintiff is to obtain possession of the house which is wrongfully withheld by the defendant who, as already shown, has no title whatever. In other words, *the scope of the present suit is to obtain possession from a rank trespasser.* No reference to the deed of gift was necessary in the plaint as part of the plaintiff's cause of action.

As my learned brother has shown, possession of defendants 1 and 2 is not referable to the deed of gift, but must have been obtained by them apart from it, and *if it is right to hold that the defendants have no title under the gift*, their possession is unwarranted and gave a cause of action to the plaintiffs if withheld from them when they demanded it."

It is well known that the words "cause of action" mean bundle of facts which are necessary to be proved to entitle the plaintiff to a declaration. The cause of action refers entirely to the grounds set out in the plaint as the

cause of action or, in other words, to the media upon which the plaintiff asks the court to arrive at a conclusion in his favour. It has no relation to the defence set up or to the reliefs prayed for in the plaint.

Applying this test for determining whether the causes of action in the former suit for declaration and in the subsequent suit for possession are the same or not, if the former suit was based on the allegation that the defendants were threatening to take possession of the entire property of the deceased and, therefore, the court should give a declaration about the rights of the plaintiffs under the will, but the allegation made in the subsequent suit is that the High Court found the defendants in the former suit to be in possession of the house and as such a decree for possession should be granted, then, in the earlier suit, all that the plaintiffs had to establish was that they had title to the property and that the defendants were threatening to interfere with their rights but, in the present or subsequent suit, apart from establishing the title, the plaintiffs have to establish that the defendants have taken possession of the property. The allegations on the basis of which the two suits are founded are different, and the facts which the plaintiffs have to prove in two suits are also different. Under the circumstances, it cannot be said.that the cause of action in the two suits is the same.

Another test for finding out whether cause of action in the two suits is the same or not, is to see whether, on the allegations made in the earlier suit, the relief claimed in the subsequent suit could also be granted. If, for the grant of a relief in the subsequent suit, certain other facts are to be proved and established, it cannot be said that the cause of action in the second suit will be the same as in the first suit.

So the first suit having been brought on the allegation that the defendants were threatening to take possession of the property, no relief for.possession could be granted. Therefore, the cause of action in the former suit for declaration and in the subsequent suit for possession are different and the subsequent suit would not be barred by the provisions of O. 2, rule 2, C. P. C.

Under the law, it may be possible for a plaintiff to claim more than one reliefs in respect of one cause of action and, if, in respect of that cause of action, further relief is not claimed, subsequent suit may be barred under the provisions of Order 2, rule 2.

If the two causes of action are different, then merely because it was possible to join the two causes of action in one suit and to claim reliefs in respect of them in the same suit, it will not be possible to say that the cause of action became one and the same. If separate suits are brought in respect of two causes of action, it cannot be said that the subsequent suit based on the second cause of action will be barred by Order 2, rule 2 on the ground that the two causes of action could be joined in one suit.

In a case where it was possible for the plaintiff to have sought the relief for possession on the alternative ground that in case they were found out of possession, a decree for possession may also be granted. In other words, it was possible for the plaintiffs to have joined the second cause of action with that in the earlier suit and to have claimed the relief prayed for possession in the subsequent suit, but it does not mean that the two causes of action are the same and, as such, provisions of Order 2, rule 2 apply. There is no law which compels a plaintiff to join two different causes of action in one suit and, on his failure to do so, to bar entertainment of the second suit on the basis of second cause of action.

The *Explanation* to Sub-rule (3), though appearing as an Illustration to sub-rules (1) and (2), is really a substantive enactment making an obligation and a collateral security for its performance (which would otherwise be two independent causes of action) one cause of action for the purposes of the Rule.

Splitting of causes of action (or Splitting of claim).—It is not necessary to give all the causes of action, but the grounds for a single cause of action must be united in the same suit. The rule of bar by splitting a cause of action enunciated in Order II, Rule 2 of Civil Procedure Code is closely linked to Rule I of Order II.

This rule of bar by splitting of causes of action is directed to securing the exhaustion of the relief in respect of a cause of action, and not to the inclusion in one and the same action of different causes of action, even though they arise from the same transaction.

The rule thus is based on the unity of cause of action and the expression "cause of action" is used in this connection in a broad sense so as to include not only the act which infringes the right but also the right itself and the circumstances giving it birth. The cause of action here does not depend on the character of the relief sought but refers to the media on which the plaintiff asks the Court to arrive at a conclusion in his favour, to every fact which it would be necessary for him to prove. If the evidence required to support two claims is materially different, the causes of action are different

The application of the rule, no doubt, presupposes that the Court had jurisdiction to entertain the entire cause of action and also that the parties in the two suits or their representatives are the same. Again, the bar in this case arises by filing of the plaint and the decision whether the bar exists or not be arrived at from the very perusal of plaints in the two cases.

Joinder of causes of action.—Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly.

Any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit. (O. 2, R. 3 (1)).

It is in the option of the plaintiff to bring several suits on separate causes of action or to unite them in one suit. Several causes of action can be joined by or against several persons when they are jointly interested in all the causes of action. Even when they are not jointly interested, the causes of action may be joined if they arise out of the same act or transaction and give rise to common question of fact or law : as for example, A and B are prosecuted by X and are acquitted. Suit by A and B against X for malicious prosecution lies because it arises out of a single act of X and gives rise to common questions of fact and law.

From Rule 3 (1), it is clear that where the plaintiff is one and the defendants are several the plaintiff may, in the same suit, unite several causes of action against the several defendants provided that all such defendants are jointly liable in respect of each and all such causes of action, and the condition precedent to the plaintiff being allowed to join several causes of action against several defendants is that such defendans must all have a joint interest in the main question raised by the litigation and that causes of action joined in one suit against several defendants must be causes of action in which the defendants are all jointly interested. It is not necessary that every defendant

should be interested as to all the reliefs claimed in the suit but it is necessary that there must be a cause of action in which all the defendants are more or less interested although the relief asked against them may vary.

Where there are two or more than two plaintiffs and several defendants the plaintiffs may unite in the same suit the causes of action agaainst the defendants, provided that the plaintiffs are jointly and the defendants are also jointly interested in those causes of action.

Besides, there are two more cases with regard to joinder of causes of action. They are contained in Rules 4 and 5 of Order 2.

No cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immovable property, except—

(a) claims for *mesne profits* or arrears of rent in respect of the property claimed or any part thereof ;

(b) claims for damages for breach of any contract under which the property or any part thereof is held ; and

(c) claims in which the relief sought is based on the same cause of action :

Provided that nothing in this rule shall be deemed to prevent any party in a suit for foreclosure of redemption from asking to be put into possession of the mortgaged property. (O. 2, R. 4).

Consequence of joinder of causes of action.—Where causes of action are united, the **jurisdiction of the court** as regards the suit depends on the amount or value of the aggregate subject matters at the date of instituting the suit. (O. 2, R. 3(2)).

Objection as to misjoinder of causes of action.—All objections on the ground of misjoinder of causes of action shall be taken—

(a) at the earliest possible opportunity ; and

(b) in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen.

Any such objection not so taken is deemed to have been waived.'(Order 2, R. 7).

On such objection being taken, the Court may order the plaintiff to amend the plaint by withdrawing a portion of the claim with liberty to bring it again and if the plaintiff fails to amend, the suit may be dismissed.

Misjoinder of causes of action.—A suit which offends against the rules relating to joinder of causes of action is said to be bad for misjoinder of causes of action.

Example.—A suit against a trustee relating to trust property joined with a claim against him in his personal capacity is bad for misjoinder of causes of action.

Misjoinder plaintiffs and causes of action when—

(a) there are several plaintiffs who are not jointly interested in all the causes of action ; or

(b) the causes of action do not arise from the same transaction ; or

(c) even if the plaintiffs are jointly interested, they present no common question of fact or law.

A suit by one of the two widows and an adopted son of a deceased, claiming to recover either the whole family estate for the latter, or in case adoption is not held valid, one half of the estate for the former, is bad for misjoinder of plaintiffs and causes of action. (*Lingam Mal* v. *Chinna*, 6 Mad. 239).

Misjoindər of defendants and causes of action is also technically called *multifariousness*. It arises where there are several defendants and they are jointly interested in all the causes of action nor do the causes of action arise from the same transaction or, if they do arise from the same transaction, they present no common question of fact or law.

Multifariousness means the misjoinder of distinct causes of action and of defendants who are not so jointly interested as to be united in one suit. The suit is bad for multifariousness.

Illustration.—A, B and C are three co-sharers of a village. A sells his share to D. On the same day B sells his share also to D. C sues A, B, and D for pre-emption of the shares sold by A and B to D. The suit is bad for multifariousness, for the two sales constitute two distinct transactions giving rise to two distinct causes of action.

A suit by a plaintiff to whom a member of a joint Hindu family had agreed to transfer his share for specific performance of the contract against him and for partition of that share against the other members is a suit which is bad due to misjoinder of defendants and causes of action.

But where the plaintiff has but one cause of action against several defendants there can be no multifariousness and he can bring one suit although the defendants may claim under different titles or have different defences. For instance, a person claiming as a reversioner to a deceased Hindu widow may sue several defendants in whose favour alienation may have been made. Where different defendants conspire to commit separate wrongs against the plaintiff, one suit lies for damages in respect of those wrongs. (*Reddi* v. *Madava*, 20 Mad. 360).

Problem.—Z holds a bill of exchange executed in his favour by A, B, *and* C. B *and* C *have executed a promissory note in favour of* Z. C *has become liable to* Z *on a cheque.* Z *sues all the defendants in one suit on all these documents.*

The suit is not maintainable. A cause of action arising out of a joint liability of some defendants cannot be united in the same suit with another cause of action under a transaction in which one of them alone was concerned [4 I. C. 1097]. Nor can separate causes of action against separate sets of defendants be joined in one suit. [6 Mad. 273 and 6 C. W. N. 585].

Joinder of claims by or against executor, administrator or heir.—No claim by or against—

(a) an executor,
(b) administrator, or
(c) heir,

as such shall be joined with claims by or against him personally unless the last-mentioned claims—

(i) are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor, administrator or heir; or
(ii) are such as he was entitled to, or liable for, jointly with deceased person whom he represents. (O, 2, R. 5).

CHAPTER IV

RECOGNIZED AGENTS & PLEADERS

Appearances, etc., in or to any Court—Any—

(a) appearance,

(b) application, or

(c) act,

in or to any Court, required or authorized by law to be made or done by a party in such Court,—

may, except where otherwise expressly provided by any law in force, be made or done by—

(a) the party in person ; or

(b) his recognized agent ; or

(c) a pleader,

appearing, applying or acting, as the case may be, on his behalf.

But any such appearance shall, if the Court so directs, be made by the party in person. (O. 3, R. 1).

Recognized agents.—The recognized agents of parties by whom such appearances, applications and acts may be made or done are—

(a) persons holding powers-of-attorney, authorizing them to make and do such appearances, applications and acts on behalf of such parties ;

(b) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done or done in matters connected with such trade or business only, where no other agent is expressly authorized to make and do such appearances, applications and acts. (O. 3, R. 2).

Persons being *ex officio* or otherwise *authorized to act for the Government* in respect of any judicial proceeding are deemed to be the recognized agents by whom appearances, acts and applications under Civil Procedure Code may be made or done on behalf of the Government. (O. 27, R. 2).

Service of process on recognized agent.—Processes served on the recognized agent of a party are as effectual as if the same have been served on the party in person, unless the court otherwise directs.

The provisions for the service of process on a party to a suit apply to the service of process on his recognized agent. (O. 3, R. 3).

Appointment of pleader.—No pleader shall act for any person in any court unless he has been appointed for the purpose by—

(a) any such person by a document in writing signed by such person or by his recognized agent ; or

(b) some other person duly authorised by, or under, a power of attorney to make such appointment. O. 3, 4 (1)).

Every such appointment shall—

(a) be filed in court, and

(b) be deemed to be in force until—

(i) determined with leave of the court, by a writing signed by the client or the pleader, as the case may be, and filed in court ; or

(ii) the client or the pleader dies ; or

(iii) all proceedings in the suit are ended so far as regards the client. (O. 3, R. 4 (2)).

For the purposes of sub-rule (2),—

(a) an application for review of judgment ;

(b) an application under Section 124 of the Code of Civil Pracedure, requiring Rule Committee to amend the Rule in the First Schedule or to make new rules ;

(c) an application under Section 152 of the Code of Civil Procedure, for amendment of judgments, decrees or orders ;

(d) any appeal from any decree or order in the suit ; and

(e) any application or act for the purpose of –

(i) detaining copies of document, or

(ii) return of documents produced or filed in the suit ; or

(iii) obtaining refund of moneys paid into the court in connection with the suit,

is deemed to be proceedings in the suit. (O. 3, R. 4 (3)).

Before tall claims are made which cannot stand against law and the constitution, those that make them should reasonably be sure. that they are right. (*State of Punjab* v. *Satya Pal Dang*, A. I. R. 1969 S. C. 903).

The High Court may, by general order, direct that, where the person by whom a pleader is appointed is unable to write his name, his mark upon the document appointing the pleader shall be attested by such person and in such manner as may be specified by the order. (O. 3, R. 4 (4)).

No pleader who has been engaged for the purpose of pleading only shall plead on behalf of any party, unless he has filed in Court a memorandum of appearance signed by himself and stating—

(a) the names of the parties to the suit,

(b) the name of the party for whom he appears, and

(c) the name of the person by whom he is authorised to appear :

Provided that nothing in this sub-rule shall apply to any pleader engaged to plead on behalf of any party by any other pleader who has been duly appointed to act in Court on behalf of such party. (O. 3, R. 4 (5)).

Service of process on pleader.—Any process—

(a) served on the pleader of any party, or

(b) left at the office or ordinary residence of such pleader.

Whether the same is for personal appearance of the party or not, is—

(a) presumed to be duly communicated and made known to the party whom the pleader represents ; and

(b) unless the court otherwise directs, as effectual for all purposes as if the same had been given to, or served on, the party in person. (O. 3, R. 5).

The Government pleader in any Court is the agent of the Government for the purpose of receiving processes against the Government issued by such Court. (O. 27, R. 4).

Agent to accept service.—Besides the recognized agents, any person residing within the jurisdiction of the court may be appointed an agent to accept service of process. Such appointment may be—

(1) Special ; or

(2) General.

Such appointment shall be made by an instrument in writing signed by the principal.

Such instrument or, if the appointment is general, a certified copy thereof, shall be filed in Court. (O. 3, R. 6).

CHAPTER V

PLEADINGS GENERALLY

Pleading.—Pleading means the statement of the plaintiff or defendant with which he comes into the Court. Under Order VI, Rule 1 of C. P. C. pleading means plaint or written statement.

Pleadings are statements in writing drawn up and filed by each party to a case, stating what his contentions will be at the trial and giving all such details as his opponent needs to know in order to prepare his case in answer.

As a rule, in India, there are only two pleadings in a suit, viz. :—

(i) A statement of claim, called the "Plaint", in which the plaintiff sets out his cause of action with all necessary particulars ; and

(ii) A defence, called the "Written Statement", in which the defendant deals with every material fact alleged by the plaintiff in the Plaint and also states any new facts which tell in his favour, adding such legal objections as he wishes to take to the claim.

The forms in Appendix A to the Code of Civil Procedure when applicable and, where they are not applicable, forms of the like character, as near y as may be, shall be used for all pleadings. (Rule 3 of Order VI).

The whole *object of pleadings* is to ascertain with precision the points on which the parties agree and those on which they differ and thus they bring the parties to a definite issue, so that the parties may be saved from the expense and trouble of calling evidence which may prove unnecessary, and further that neither party may be taken by surprise.

Fundamental requisites of a pleading.—The essentials of pleadings have been laid down in Order 6 of the Code of Civil Procedure. They are described below :—

(1) Pleading to state material facts and not evidence.—Every pleading shall contain, and contain only, a statement, in a concise form, of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved. (O. 6, R. 2).

From the above, the following fundamental requisites of a pleading can be deduced :—

(a) **Every pleading must state facts and not law :**—It is the duty of the parties to bring out the facts to the notice of the Court without pleading the provisions of law, the conclusions of law, the inferences of law or propositions of law or of mixed facts and law. The pleadings should be confined to facts only. It is bad pleading to plead certain conclusions of law without narrating the facts or the particulars on the basis of which they have been arrived at. It is for the Court to draw such conclusions of law from the facts narrated in the pleadings as are permissible under the law, of which it is bound to take judicial notice.

For instance, it is wrong to plead that the plaintiff is the legal heir of the deceased, without stating the ground of relationship.

Similarly, it is wrong to plead that 'the plaintiff is entitled to Rs. 500 from the defendant" or that "the defendant is bound to render accounts to the plaintiff." On the contrary, the plaintiff should state how the liability of the defendant arose—whether by way of damages or by contract, and the particulars of the debt or the contract. Similarly, he should state how and why the defendant is liable to render account ; whether he is an agent or a partner, etc.

Again, it is wrong to say that "the defendant is guilty of negligence." Instead, the facts from which negligence may appear should be narrated.

"The mortgage deed in suit is void and of no effect in law" or "the plaintiff is entitled to redeem the mortgage" are other instances of bad pleading. Instead, facts should be narrated which would show how and on what fact the mortgage is void and how the plaintiff is entitled to redeem. It is necessary to give particulars of mortgage in a suit on mortgage bond. It is again a conclusion of law to plead that "the mortgage was made for legal necessity and is binding on the son of the mortgagor". The exact legal necessity should be specified.

This is *so far as the plaint* is concerned.

If a very technical and strict view is to be taken of the plaint, one can say that there is no basis of facts alleged in it to found a claim under section 70 o the Indian Contract Act, but, for the application of the principles of Section 70 of the Indian Contract Act, such a strict and technical view of the pleading should not be taken. (*Ram Swarup Maru* v. *State of Bihar*, A. I. R. 1969 Pat. 340 (D. B.)).

When the plaintiff states in the plaint that she was the legally wedded wife of A, but does not say in which form of marriage she was married to A, it was *held* that, if her marriage was performed in accordance with any modified form, it must be pleaded and proved as a custom. If the plaintiff in the plaint had mentioned about the existence of a *custom* of Udiki marriage for widows and its essential requisite ceremonies, then the defendants would have known—

(a) What case they had to meet and

(b) What evidence they had to lead against the existence of a custom of Udiki marriage or regarding the essential ceremonies of such Udiki marriage.

In the absence of a pleading, no amount of evidence can be looked into, (*Malakayya* v. *Avati Buchamma*, A. I. R. 1973 Andh. Pra. 208 (D. B.)—(1972) 2 Andh, L. T. 253).

In a written statement, it is wrong to plead that the defendant is not liable to pay the amount claimed or that the defendant published the libel on a privileged occasion or that section 41, Transfer of Property Act, protects the defendant. These are pure conclusions of law. The correct procedure is to state the facts whether the defendant had paid off the amount ; if so, the date and the amount thereof ; and if not, what is the ground on which the

defendant pleads non-liability. Similarly, he should state the particulars of the occasion which he claims to be privileged.

It is, however, open to the parties to plead foreign law, custom or usage of trade. They may also take legal *pleas* or objections in points of law, such as the suit is barred by *res judicata*, limitation, jurisdiction or estoppel, though the facts on which the legal *pleas* are based should be narrated.

A judge is bound to apply the correct law and draw correct legal inferences from the facts, even if the party has been foolish enough to make a wrong statement about the law applicable to those facts. It is a mistake to think that the Judge is not bound to consider, or rather is bound to consider any view of the law in respect of the facts before him except such as laid before him formally by the parties. (*Gaura* v. *Shri Ram*, A. I. R. 1926 Nag. 265 : *Narayandin* v. *Mahesh Singh*, A. I. R. 1926 Nag. 313).

(*b*) *It must state all the material facts, and material facts only.*—*Material facts* are facts which, it is necessary for the parties to prove in order to sustain their claim or defence. Facts which are not material should not be pleaded while it is risky to omit material facts. Where there is any doubt whether a particular fact is material or not the safest course is to plead the same instead of omitting it. For instance, in a suit for money due on a promissory note payable on demand, it is unnecessary to plead that plaintiff demanded the money from the defendant and that the latter refused to pay.

Similarly, it is superfluous to plead in a suit for ejectment of a trespasser that the plaintiff asked the trespasser to evict but he did not abide by it. In a suit for arrears of rent, the plaintiff need not plead his title to the property.

In a suit for damages for assault, it is useless to plead that the defendant was convicted by the criminal court.

General damages need not be pleaded nor is any evidence necessary to prove the amount of general damages. The law presumes that they are natural and probable consequences of defendant's act. Special damages must, on the other hand, be alleged. It should be stated that the loss was incurred and that the loss was the direct result of defendant's conduct. Facts in aggression or mitigation of damages may always be alleged by the plaintiff as well as the defendant.

A plaintiff suing for money lent, need not plead that the defendant stood in need of money and demanded the same from him.

In his written statement, the defendant need not plead to—

(i) the prayer in the plaint ; or

(ii) any matter which merely affects costs.

No fact should be alleged in the pleading which is not material at the stage in which the suit is brought.

(c) It must state—

(i) *only the facts on which the party pleading relies, and*

(ii) *not the evidence* by which they are to be proved.

Pleadings should contain *fact a probanda i. e.*, the facts to be proved and not the *facta probanda*, *i. e.*, facts by which they are to be proved. Plaintiff need not disclose his evidence before the defendant has filed his written statement.

Previous statements of the party pleading which corroborate the allegations about material facts need not be alleged, *e. g.*, that the plaintiff reported the matter to the police or that the plaintiff has filed a complaint in the criminal court, etc.

(b) **It must state such facts concisely but with precision and certainty.**—Pleadings should be concise but precise. It is bad to be verbose in pleadings but, when necessary, long facts must be given. Brevity must not lead to obscurity. In this connection, it is good to remember the following points :—

(i) Avoid unnecessary facts *e. g.*, matters of law, of evidence, performance of condition precedent; matters not alleged in opponent's pleading ; matters presumed by law, etc.

(i) Avoid pronouns unless the antecedent be very close.

(iii) Refer to the plaintiff or the defendant throughout the pleading in the same way.

(iv) Avoid 'ifs' and 'buts'.

(v) Avoid passive voice. As far as possible use sentences in active voice.

(vi) Avoid complex sentences—use short and simple sentences.

(vii) Avoid repetition.

(viii) All unnecessary adverbs and adjectives and argumentative *pleas* must be avoided.

(ix) The legal effect of a document can be stated shortly without repeating its words.

The language used in the pleadings should be simple but without giving rise to emotion or sentiment.

The facts asserted must be definitely stated.

Variance between pleadings and proof :—It may be contended by the defendant that the plaintiff's suit for recovery of the sum cannot be decreed on the ground that the defendant was a surety since that was not the case of the plaintiff in his plaint. The defendant was not sued as a surety, but the suit attempted to fasten the liability on him as a joint account holder. The pleadings referred to his liability as a joint account holder. Further, there was no specific issue as to whether the defendant executed the collateral securities and held himself out liable as a surety.

But the defendant could not be said to have taken by surprise when the two promissory notes which were admittedly collateral securities, were marked during the course of evidence. Not only these promissory notes were produced, but there was considerable reference made to them during the examination of the witnesses produced by the parties. The trial court had elaborately dealt with these collateral securities in its judgment. Thus there can be no ground

for the suggestion that the defendant was not fully informed that this question of collateral security executed also by the defendant would be raised and that both the promissory notes executed as collateral securities would be relied upon to prove the fact that the defendant executed them and that he had held himself out as surety for the amount simultaneously advanced or agreed to be advanced in future to his brother. It is indeed the only purpose for which these promissory notes could have been given in evidence in the suit.

It is also pertinent to note that the defendant or any other party did not suggest at any stage of the suit that an issue should be framed in that behalf nor at any time did any one of them object regarding the introduction of the question of collateral security and contended that it was outside the scope of the inquiry in the suit

Therefore, although the evidence let in on issues on which the parties actually went to trial, should not be normally made the foundation for decision of another and different issue which was not present to the minds of the parties and on which they had no opportunity of adducing evidence. This rule, however, has no application to the present case where the parties had gone to trial with full knowledge that the very question was in issue, though no specific issue was framed, and adduced evidence relating thereto.

Next, the argument of the defendant that since no relief was claimed by the plaintiff on the basis of surety against the defendant alternatively, the court cannot grant a decree on that basis, cannot be accepted. It is true that it was not part of the plaintiff's case in the plaint that the defendant stood surety for his brother in regard to suit transactions. But it was certainly open to the plaintiff to make an alternative case to that effect and make a prayer, in the alternative for a decree if the allegation of joint holders of account against the defendant could not be established by evidence. The plaintiff could have asked such an alternative relief.

The question, however, is whether, in the absence of any such alternative case in the plaint, it is open to the Court to give the plaintiff relief on that basis.

It is true that, normally, the Court will not grant relief to the plaintiff on a case—

(a) for which there was no foundation laid in the pleadings ; and

(b) which the defendant was not called upon to meet. But when—

(a) the alternative case which the plaintiff could have made, was admitted by the defendant either—

(i) in his written statement ; or

(ii) in his evidence ; and

(b) the parties adduced evidence relating to such an alternative claim.

There would be nothing improper in giving the plaintiff a decree upon such alternative claim.

It cannot be regarded that the defendant was taken by surprise in circumstances where no injustice can possibly result to the defendant. It may not be proper to drive the plaintiff to a separate suit.

In the instant case, the defendant admitted the execution of the promissory notes and no dispute was raised before the Court that they were not

executed as collateral securities regarding the current and overdraft account opened by the defendent and his brother. The defendant infact led evidence in regard to his contention that he put his signature on the promissory notes at the request of his brother. It cannot, therefore, be validly contended that the defendant was taken by surprise when the plaintiff's suit was decreed by the trial court on the alternative claim.

The case of *Raja Mohan Manucha* v. *Manzeor Ahmed Khan*, A. I. R. 1943 P. C. 29 = I. L. R. 18 Luck. 130, was a case to enforce a mortgage security. The plea of the defendant was that the mortgage was void. This plea was given effect to by the two courts below and was upheld by the Privy Council. But the Privy Council held that it was open, in such circumstances, to the plaintiff to repudiate the transaction altogether and claim a relief outside it in the form of restitution under section 65 of the Indian Contract Act. Although no such alternative claim was made in the plaint, the Privy Council allowed the plea to be advanced and gave a decree on the ground that the respondent would not be prejudiced by such a claim at all and the matter ought not to be left to a separate suit. (*see* also *Firm Srinivas Ram Kumar* v. *Mahabir Prasad*,, A. I. R. 1951 S. C. 177 = 1951 S. C. R. 277 ; *Vishram Arjun* v. *Shankariah*, A. I. R. 1957 A. P. 784).

(2) Every pleading shall, when necessary, be divided into paragraphs and numbered consecutively.

Dates, sums and numbers shall be expressed in figures. (O. 6, R. 2).

(3) **Forms of Pleadings.**—The forms in Appendix A to the Code of Civil Procedure when applicable and, where they are not applicable, forms of the like character, as nearly as may be, shall be used for all pleadings. (O. 6, R. 3 .

(4) **Giving of particulars.**—(a) In all cases in which the party pleading relies on any—

(i) misrepresentation ;

(ii) fraud ;

(iii) breach of trust ;

(iv) wilful default ; or

(v) undue influence, and

(b) in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid,

particulars (with dates and items, if necessary) shall be stated in the pleading. (O. 6, R. 4).

'*Particulars*' means the various statements of claim or defence which a plaintiff or defendant has to make in his plaint or written statement. 'Particulars' in connection with pleadings, mean details of any matter stated in any pleading. In the Code of Civil Procedure, it is laid down that particulars must be stated when misrepresentation, fraud, breach of trust, wilful default or undue influence is pleaded ; and in other cases in which more particulars than are exemplified in the Forms in Appendix A of the Code are necessary, they are to be stated in the pleading. [O. VI, R. 4].

The *Object of particulars* is to prevent surprise at the trial and to limit the inquiry at the trial to the matters set out in the particulars. So particulars ought to be encouraged. They tend to narrow the issues. Pleadings

must be concise but they must also be precise. For this purpose, all necessary particulars must be embodied in the pleadings.

In a *suit* by the father of his deceased son *for damages arising from death by accident*, there is no specific averment in the plaint to the effect that there was a reasonable expectation of pecuniary benefit. All that is stated is that the boy had a bright future before him and he could have been of considerable camfort and ass istance to his parents and, as a result of his death, they have been deprived of the assistance and support which they would otherwise have derived from their son. Thus, the pleadings are vague and lack essential averments. (*Government of India* v. *Jeevaraj Alva, minor by next friend and father Dr. Nagappa Alva.* A. I. R. 1970 Mys. 13 (D.B.) : (1969) 1 Mys. L. J. 244). The material pleadings regarding the entire claim made in the suit are contained in plaint paragraphs 8 to 11. The plaintiffs have claimed damages for the loss of future assistance to them. There is no averment made in the plaint that any damages are claimed for loss of expectation of life of the son. The court below has held that since paragraph 11 of the plaint states that a claim is made under the Fatal Accidents Act read with the Indian Succession Act, that can be construed as a claim made under section 2 of the Fatal Accidents Act also It has to be *held* that the claims arising under sections 1-A and 2 of the said Act are founded on two distinct causes of action. *Odgers* in his 'Principles of Pleading and Practice' 18th edition at page 474, has given a precedent for a claim arising from death by accident. The practice is to make a specific claim for loss of expectation of life. The plaintiffs have claimed a consolidated sum of Rs. 20,000 as damages but they have not stated separately the amount claimed in respect of the two distinct causes of action. Therefore, the pleadings are defective, and, when the plaint clearly states that the damage claimed is the loss suffered by the plaintiffs, that pleading cannot be construed as a claim for damages suffered by the estate of the deceased.

Misrepresentation.—"*Misrepresentation*" means and includes—

(1) The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true ;

(2) Any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice or the prejudice of any one claiming under him ;

(3) Causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is subject of the agreement. (Sec. 18 of the Indian Contract Act).

Generally speaking, misrepresentation is a mis-statement of a material fact not known to be false or non-disclosure of facts (where there is a duty to disclose) not intended to deceive. It is the absence of intention to deceive which mainly distinguishes mis-representation from fraud.

Misrepresentation means an innocent and unintentional false statement of a material fact not warranted by the information of the person making it *i. e.*, made without any reasonable ground.

Clause (1).—*Positive assertion* means an absolute and explicit statement of a fact.

An estimate or expression of opinion or words of commendation must as are commonly uttered by an auctioneer, cannot be held to amount to a positive assertion.

If there is honest belief and reasonable ground for such belief, then it is neither fraud nor misrepresentation. In such cases, the contract can be avoided on the ground of mutual mistake, for example, *A* agrees to buy from *B* certain goods and it turns out that the goods were burnt at the time of bargain, neither party knowing it.

If there is no honest belief, it is fraud, for example, misrepresentation by an auctioneer that the property sold is free from encumbrance.

Example.—*A* makes a positive statement to B that C would be a director of a company about to be formed. B applies for shares on the faith of that statement.

The statement would be misrepresentation if A did not derive information from C but from a third person and statement was made innocently and unintentionally. An assertion cannot be said to be based on reasonable ground where it is based upon hearsay.

If there is honest belief in the truth of a statement but no reasonable ground for the belief, it amounts to misrepresentation which must be a *positive assertion.*

Problem.—A sold a mare to B. Before the sale in answer to an inquiry by B, A wrote to B as follows :

"I think your queries would be satisfactorily answered by a friend if you have one in the station and I shall feel more satisfied. All I can say is that the mare is thoroughly sound."

It was *held* that the concluding words were a positive assertion as to soundness of the mare. (*Currie* v. *Rennick* 41 P. R. 1886).

Clause (2).—Misrepresentation means failure to make a disclosure which, from the nature of the case, is obligatory, though there is no intention to deceive. In other words, silence when there is a duty to disclose, is misrepresentation. Such misrepresentations correspond to what is known in Equity as *Constructive Fraud.*

Thus sub-section (2) of Sec. 18 is intended to meet all those cases whi h are called in the courts of equity as cases of constructive fraud in which there is no intention to deceive but where the circumstances are such as to make the party who derives a benefit from the transaction equally answerable in effect as if he had been actuated by motives of fraud.

Example.—A solicitor gives his client advice leading to the latter's loss in breach of the former's duty but without an intent to deceive.

The lawyer will be liable because he has acted in breach of his duty to take care, although innocently, with the client with whom he was in contractual relationship of lawyer and client.

This principle of constructive fraud has been taken in Indian law from the English law. Constructive fraud is (or arises) where, although there may be no fraud in fact, yet the transaction is deemed fraudulent, either—

(i) Because it is contrary to the policy of the law ; or

(ii) Because it is an abuse of some fiduciary relation ; or

(iii) Because it operates as a fraud upon the private rights and interests of third persons.

In the words of Justice Story: "By constructive fraud is meant such acts or contracts as though not originating in any actual evil, design or contrivance to perpetrate a positive fraud or injury upon other persons are yet, by their tendency to deceive, or mislead other persons, or to violate, private or public confidence.....deemed equally reprehensive with positive fraud, and are prohibited by laws within the same reason and mischief as acts and contracts done *malo amino*" (with bad intent). Thus despite the absence of the intent to deceive, the attorney would be liable for breach of his duty to take care. Under similar circumstances, an attorney was held responsible in *Nocton* v. *Ashburton*, (1914) A. C. 932, because the parties stand in fiduciary relation to each other and any carelessness on the part of the lawyer cannot be tolerated.

A contract of insurance requires the fullest disclosure on the part of a party. Non-disclosure as to any fact likely to affect the willingness of the other party in such a case would, at all events, be misrepresentation. It may also amount to fraud.

Clause (3).—According to Section 18 (3), misrepresentation means mistake as to the substance of a thing which is the subject of the agreement, caused by the other party innocently.

An agreement by the defendant to sell and deliver an engine boiler to the plaintiff at his place (*Rajghat*) was held by the Allahabad High Court voidable at the option of the defendant, the plaintiff having represented, though innocently, to the defendant that there was practicable road all the way while as a matter of fact there was at one place a suspension bridge not capable of bearing the weight of the boiler.

Problem.—The defendants in Bombay chartered a ship wholly unknown to them from plaintiffs, which was described in the charter-party and was represented to them as being not more than 2,800 tonnage register. It turned out that the registered tonnage was 3,045 tons. The defendants refused to accept the ship in fulfilment of the charter-party.

It was *held* that they were entitled to avoid the charter-party by reason of erroneous statement as to tonnage and the case falls under section 18 (3).

Distinction between fraud and misrepresentation.—(1) Fraud implies that there must be intention to deceive whereas misrepresentation may be innocent *i.e.*, there may not be deceit or an intention to gain an advantage.

(2) Fraud, besides avoiding the contract, gives right to an action for deceit (an action *ex-delicto*) and the party induced can recover damages if he has sustained any, in consequence of fraud practised upon him by the other side. Misrepresentation may only vitiate the contract.

(3) In fraud, the defendant cannot set up the defence that the plaintiff had the means of discovering truth or could have done so with ordinary diligence whereas in case of misrepresentation it would be a good defence.

Thus the above are the points of difference between innocent *misrepresentation* and *fraudulent* misrepresentation. But both make a contract voidable at the option of the party injured by the misrepresentation.

Effect of misrepresentation.—When a person has been induced to enter into a contract by misrepresentation the agreement is a contract voidable at the option of the party whose consent was so caused. A party to a contract, whose consent was caused by misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representation made had been true. (Section 19).

Problems.—(i) A sold certain zamindari property to B on the representation that the income of the property as entered into the revenue papers was Rs. 100 annually, although A knew as a fact that the income was Rs. 800 only.

B can avoid the sale on discovering the misrepresentation because consent to the agreement is caused by misrepresentation and the agreement is, therefore, voidable at the option of the party whose consent was so caused.

(ii) A contract was induced by a false statement made by the promisee through want of sufficient care but in the honest belief that it was true.

The injured promisor is not bound by the contract as he entered into the contract under a misrepresentation made to him by the promisee. A false statement made through want of sufficient care, though the person making it honestly believes it to be true, amounts to misrepresentation and hence the contract so entered into is voidable at the instance of the aggrieved party.

Fraud.—"Fraud" means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract :—

(1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true ;

(2) the active concealment of a fact by one having knowledge or belief of the fact ;

(3) a promise made without any intention of performing it ;

(4) any other act fitted to deceive ;

(5) any such act or omission as the law specially declares to be fraudulent.

Explanation.—Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech."

Illustrations.—(a) A sells, by auction, to B, a horse which A knows to be unsound. A says nothing to B about the horse's unsoundness. This is not fraud in A.

(b) B is A's daughter, and has just come of age. Here, the relation between the parties would make it A's duty to tell B if the horse is unsound.

(c) B says to A.—"If you do not deny it, I shall assume that the horse is sound." A says nothing. Here, A's silence is equivalent to speech.

(d) A and B, being traders enter upon a contract. A has private information of a change in prices which would affect B's willingness to

proceed with the contract. A is not bound to inform B. [Section 17 of the Indian Contract Act].

The *plea of fraud* should be raised most precisely. The allegations of fraud must be clear, definite and precise, otherwise the court will refuse to take notice of it and the effect will be the same as if the plea has not been raised at all. The Calcutta High Court has held that a plaint which is based on the fraud and in which no particulars of the fraud are specified, does not disclose a cause of action and is liable to be rejected. (*See* 36 Cal. 134). A precise statement of the nature of fraud must be given because a party pleading one kind of fraud cannot be allowed to plead of another kind. When the plea of fraud is raised, the date, the place of the fraudulent statement, the party to whom it was made, the gist of the statement, and the way in which such statement was intended to deceive must be specified. It should also be mentioned that the party was really deceived. But the strict rules of giving particulars of fraud are relaxed mainly in the cases of *pardanashin* women.

Fraud may be defined as a false representation of fact either by actual suggestion or active concealment, made with a knowledge of its falsehood or without belief in its truth or recklessly without inquiring whether it is true or false, in order to deceive another or make him enter into a contract. It is also absolutely necessary that the complaining party must have relied upon the false statement and acted upon it. Misrepresentation of law does not give rise to an action.

Essentials of fraud.—I. The act constituting fraud must have been committed by a party to the contract or with his connivance or by his agent. But fraud by a stranger to a contract does not affect the contract. If the person by whose fraudulent misrepresentation a transaction has been induced is not himself a party to the transaction the transaction stands good and cannot be repudiated. For example, if the directors of a company issue a prospectus containing a false representation on the faith of which a person is induced to apply for shares with the company, the contract may be avoided by the shareholder because the directors are the agents of the company to issue the prospectus. *Reese River Silver Mining Co.* v. *Smith*, L. R. 4 M. L. 64). If a man has been induced by the false representation of a third party to deal with another he cannot have the transaction rescinded if the other party to the transaction has not been a party or privy to the false representation. So if a man has been induced to take shares from a company by fraudulent misrepresentation made by some person, not the Director or Agent of the Company, he is bound by his contract with the Company and he cannot have it repudiated, because the fraudulent statement cannot be said to have been made by the company or its agent. (*Nicol's case*, 28 L. J. Ch. 257).

II. To constitute fraud there must be any of the following five ingredients—

(a) a suggestion as to a fact (*suggetio falsi*) of that which is not true by one who does not believe it to be true. Misrepresentation by an auctioneer that the property sold is free from encumbrance or a false declaration by the accused as to age or disease in a life policy are instances of fraudulent statement (vide *Oriental Life Assurance Co* v. *Narsingh Chari*, 25 Mad. 1 3). Representation made must be false to the knowledge of the person making it and therefore there is no fraud if the statement is made in the honest belief that it is true.

Even where the statement is not known to be false it is fraud if the untrue statement is made recklessly, not caring whether it is true or false,

i.e., a statement is fraudulent if made without any genuine belief in its truth. It is fraudulent to represent yourself as posscssing a belief which you do not possess. This is the ground of liability in the case of reckless-mis-statement of fact. The maker of the statement represents his mind as certain in the matter whereas in truth it is not certain. He says that he believes when he really hopes or wishes. It is just as fraudulent for a man to misrepresent wilfully his state of mind as to misrepresent wilfully any other matter of fact.

A mere opinion, commendatory expression, flouri shing description, exaggerated statement could not amount to a representation of a fact or a suggestion as to a fact. In a case in which representation was made that the land was very fertile and improveable it was held that such expressions, are mere puffery or exaggeiated statements commending the property to be sold. A mere expression of opinion which turns out to be unfounded will not invalidate a contract. There is a wide difference between the vendor of a property saying that it is worth so much and his saying that he gave so much for it. The first is an opinion which the buyer may adopt if he wills. The second is an assertion of fact which if false to the knowledge of the seller is fraudulent.

(*b*) An active concealment of a fact (*Suppressio veri*) by one having hnowledge or belief of the fact. If a man conceals a fact that is material to the transaction, knowing that the other party is acting on the presumption that no such fact exists it is as much a fraud as if the existence of such fact was expressly denied or the reverse of it expressly stated. A vendor cannot use any art or practice any artifice to conceal defects or make any representation for the purpose of throwing the buyer off his guard, or use any device to induce the buyer to omit inquiry or examination into the defects of the thing sold. If he says or does anything whatever with an intention to divert the eye or obscure the observation of the buyer even in relation to open defects or to prevent his use of present means of observation, there is fraud. As for *example* A, a horse dealer, sold a mare to B. A knew that the mare had a cracked hoof which he filled up in such a way as to defy detection. Defect was subsequently discovered by B. It was held that the agreement could be avoided by B as his consent was obtained by fraud. So also if a vendor knowing of an encumbrance on an estate sells without disclosing the fact and with knowledge that the purchaser is a stranger to it and under representation inducing him to buy, he acts fraudulently and violates integrity and fair dealing.

Mere reticence (concealment by silence) does not amount to legal fraud. *Caviet emptor* or purchaser beware is the principle in all contracts. Vendor is not ordinarily bound to disclose to the purchaser the defects in the article he is selling. If the parties are at arms length, neither of them is under an obligation to call the attention of the opposite party to facts or circumstances which may be within his knowledge, although he may see that they are not actually within the knowledge of the other party. Silence as regards a material fact which one party fs not bound to disclose to the other is not an active concealment or fraud and is not a ground for rescission of contract. A vendor is therefore not guilty of fraud if he fails to disclose facts which may influence the mind of the purchaser but which he is under no duty to disclose. Mere silence where there is no duty to speak is not active concealment or fraud. Silence is innocent and safe where there is no duty to speak.

The explanation to Sec. 17 deals with the silence when it does not amount to fraud. Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud—

(a) Unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or

(b) Unless his silence is, in itself, equivalent to speech.

For it, see illustrations (a) to (d) appended to sec. 17.

In certain cases, however, there is an implied duty on the party knowing certain facts to disclose to the other and if he fails to do so the other party can avoid the agreement. In contracts between an agent and his principal, a solicitor and his client, a guardian and his ward a trustee and his beneficiary, the relationship of the parties require that most ample disclosure should be made by the agent, solicitor, guardian or trustee. The principle which treats non-disclosure as equivalent to fraud, when the circumstances impose a duty that disclosure should be made, obtains specially in respect of policies of insurance. In those contracts, the parties are not entitled to contract if they were at arms length. They must not keep that, as a vendor may on the principle of *caviet emptor*, a single material fact unknown to those they deal with. Contracts of insurance are a class of cases where a duty is cast upon a party to make the fullest disclosure.

(b) *A promise made without any intention f performing or keeping it.*—A purchase made without any intention of paying the price, obtaining a loan of money without any intention of repaying the same amounts to a fraudulent promise e. g., a contract for the purchase of goods by a person in insolvent circumstances with no intention of paying for the goods. But mere failure to fulfil a promise where there is no original dishonest intention is not fraud.

(d) *Any other act fitted to deceive.*—Sub-section (4) appears to have been inserted merely for the sake of abundant-caution, because fertility of man's invention in devising new schemes of fraud is so great that it would be difficult if not impossible to confine fraud within the limits of any exhaustive definition.

(e) *Any other act or omission as law specially declares to be fraudulent.*—In some cases the disclosure of certain kinds of facts is expressly required by law and non-compliance with law is expressly declared to be fraud. Thus by section 55 of Transfer of Property Act the seller of immovable property is required to disclose to the buyer any material defect in the property of which the seller is and the buyer is not aware, and which the buyer could not with ordinary care discover. An omission to make such disclosure amounts to fraud.

III. Fraudulent representation must have induced the contracting party to enter into the contract. A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practised or to whom scuh misrepresentation was made, does not render a contract voidable.

In an action of deceit, the plaintiff cannot establish a title to relief simply by showing that the defendants made a fraudulent statement. He must also show that he was deceived by the statement and acted upon it to his prejudice. Representation which does not deceive is no fraud (vide *Horsfall* v. *Thomas*, 6 L. T. 862)

Representations charged as fraudulent must be shown—

(a) as untrue statements of facts ;

(b) that their makers knew them to be untrue ;

(c) that they were made with a view to deceive or with a view to the other party entering into the contract ; and

(d) that the complaining party relied on the statement.

So fraudulent representation must have been made with intention to deceive and must actually deceive. A deceit which does not deceive is no fraud.

The party charged with fraud should try to prove that he did not appreciate that the statement was not true even though it was untrue as a matter of fact because this would be consistent with honesty. (*Derry* v. *Peek*, (1889) 14 A. C. 337 and *United Motor Finance Co.* v. *Addison & Co. Ltd.* (1937) P. C. 21). An intention to deceive is not necessarily an intention to injure or to cheat (vide *United Motor Finance Co.* v. *Addison & Co. Ltd.*)

IV. The deceit must have been aimed at the party to the contract or his agent or with a view to induce the other party to enter into the contract. It is not necessary that the representation should be made to the other party. But if it is made with the intention that the other party should act upon it, it amounts to fraud.

"Undue influence" defined.—(1) A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other, and uses that position to obtain an unfair advantage over the other.

(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another—

(a) where he holds a real or apparent authority over the other ; or where he stands in a fiduciary relation to the other ; or

(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

(3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

Nothing in this sub-section shall affect the provisions of section 111 of the Indian Evidence Act, 1872 (1 of 1872).

Illustrations

(a) A having advanced money to his son B, during his minority, upon B's coming of age obtains by misuse of paternal influence, a bond from B for a greater amount than the sum due in respect of the advance. A employs undue influence.

(b) A, a man enfeebled by disease or age, is induced by B's influence over him as his medical attendant, to agree to pay B an unreasonable sum for his professional services. *B* employs undue influence.

(c) A, being in debt to B, the money-lender of his village contracts a fresh loan on terms which appear to be unconscionable. It lies on B to prove that the contract was not induced by undue influence.

(d) A applies to a banker for a loan at a time when there is stringency in the money market. The banker declines to make the loan except at an unusually high rate of interest. A accepts the loan on these terms. This is a transaction in the ordinary course of business and the contract is not induced by undue influence. [Section 16 of the Indian Contract Act].

The first paragraph of Section 19 defines undue influence generally, the second paragraph lays down the two main heads or frequently exhibited types of such influence and the third paragraph enables the court to draw the presumption of undue influence in certain cases.

Sub-section (1) lays down the principle in general terms. By sub-section (2) a presumption arises that a person shall be deemed to be in a position to dominate the will of another if the conditions set out therein are fulfilled. Sub-section (3) lays down the conditions for raising a rebuttable presumption that a transaction is procured by the exercise of undue influence. (*Ladli Parshad Jaiswal* v. *Karnal Distillery Co. Ltd.*, A. I. R. 1963 S. C. 1279).

Problems.—(i) The plaintiff agreed to serve on a voyage to the Baltic and back to London at £5 per month. In the course of the voyage, two seamen deserted, and the captain unable to find other men, promised that their wages would be distributed among the rest, including the plaintiff. The plaintiff brings a suit for the extra wages.

This is a transaction in the ordinary course of business and the contract is not induced by undue influence and hence the plaintiff is entitled to the extra wages.

(ii) A was a judgment-writer in the High Court when he went on a month's leave on medical certificate. Before the expiry of that leave, he applied for leave for a period of 24 months. Although the leave, applied for was to his credit, the granting of that leave was being delayed. He was in dire need of leave in his then state of mental depression and saw the Registrar of the High Court to enquire about the cause of the delay in passing the orders on his leave application. The Registrar gave A to understand that unless an undertaking in writing was given by A that he would return to duty after the expiry of his leave, his application might not have early disposal. A gave the required undertaking and his application for leave was then granted.

It was *held* by the Allahabad High Court that the relation subsisting at the time between the Registrar and A was such that the former was in a position to dominate the will of the latter. The Registrar used that position to obtain an unfair advantage over A since the consent of A to give the undertaking in writing was obtained in return for what the Registrar was bound even otherwise to do, *viz.*, to expedite disposal of A's application for leave which was due to him. Therefore A's consent to the undertaking was induced by undue influence and in consequence A was not bound by it. (*The U. P. Government* v. *J. R. Bhatta*, 1956 A. L. J. 233).

Principle of undue influence.—The doctrine of undue influence under the common law was evolved by the Courts in England for granting protection against transactions procured by the exercise of insidious forms of influence, spiritual and temporal.

The doctrine applies to :—

(i) acts of bounty ; and

(ii) other transactions in which one party by exercising his position of dominance obtains an unfair advantage over another.

The Indian Contract Act is founded substantially on the rules of English Common Law.

Contracts on the ground of folly, imprudence or want of foresight are never set aside by the courts. But, on the other hand, to protect people from being forced, tricked or misled in any way by others, into parting with their property is one of the most legitimate objects of all laws, and the equitable doctrine of undue influence has grown out of and been developed by the necessity of grappling with insidious forms of spiritual tyranny and with the infinite varieties of fraud. (*Allcord* v. *Skinner*, (1887) 36 Ch D. 145). Courts have never attempted to set aside contracts simply because they have been ill-considered or foolish, but what the courts do is to see that where one person is so situated as to be under the control and influence of another, such other does not unfairly exercise the influence and control for the advantage of himself or some object in which he is interested unless he can give clear and cogent proof that the transaction complained of was such as the law would support and recognise. The courts have always placed the burden of sustaining the transaction upon the party benefited by it.

Undue influence consists in any influence brought to bear upon a person entering into an agreement or consenting to a disposal of the property which, having regard to the age and capacity of the party, the nature of transaction and all the circumstances of the case, appears to have been such as to preclud ethe exercise of free and deliberate judgment. (*Syed Noor* v. *Qutbuddin*, A. I. R. 1956 Hyderabad 114).

The question of unconscionableness of the transaction comes for consideration only when it is determined that the relationship between the parties is such that one is in a position to dominate the will of the other and not otherwise. (*Syed Noor* v. *Qutbuddin*, A. I. R. 1956 Hyderabad 114).

Where one of the party is in a position to dominate the will of the other and he has used his position to do so, the consent of the other party is not free. Had there been no undue influence, the other party had not consented to it. Since the basis of contract is the free consent and, therefore, the courts will regard as undue any influence brought to bear on a person entering, into a contract which, having regard to the age and capacity of the party and the character and circumstances of the case, appears to preclude the exercise of free and deliberate judgment. [*Earl of Aylesford* v. *Morris*, (1873) 8 Ch. A. Cas. 490].

In such cases, since the consent of the other party is not free which is very essential, the party is given an option to avoid the contract.

The party which takes the plea of undue influence to avoid a contract must establish that the other party to the contract—

(a) was in a position to dominate his will ; and

(b) used that position to obtain unfair advantage for himself over the other party.

Transactions with Parda Nashin Ladies.—The list of relationship which usually raises presumption of undue influence is not exhaustive and courts have considered themselves free to set aside contract on the ground of undue influence in every case in which confidence has been reposed but betrayed or influence gained and abused. Amongst such transactions are

those entered into with *Parda-Nashin* ladies. A *Parda-Nashin* woman is one who, by the custom of the country or by usage of the particular community to which she belongs, is obliged to observe complete seclusion. The mere fact that a woman lives in some degree of seclusion is not enough to make her a *Parda-Nashin* woman. Such women who are generally illiterate and always living in seclusion, are easily subject to undue influence of the few people who come into contact with them. The law therefore throws round them a special cloak of protection. Whenever *Parda-Nashin* ladies complain of transaction entered into by them as having been brought about by undue influence the courts very easily draw the presumption of undue influence and throw the burden on the other party to prove that there was no exercise of undue influence and that the executor exercised her volition in the matter and understood thoroughly the nature and details of the transaction.

In *Faridul Nisa* v. *Munshi Mukhtar Ahmad*, A. I. R. 1925 P. C. 204 : 52 I. A. 342, a *pardanashin* lady brought a suit to set aside a Waqf deed executed by her. (Waqf deed—is a deed by which some property is set aside for charitable purposes and is put under trust). Their Lordships of the Privy Council in this case observed "the Law of India contains well known principles for the protection of persons who transfer their property to their own disadvantage when they have not the usual means of fully understanding the nature and effect of what they are doing. In this it has only given the special development, which India's social usages make necessary, to the general rules of English law which protect persons whose disabilities make them dependent upon or subject them to the influence of others, even though nothing in the nature of deception or coercion may have occurred."

A court when called upon to deal with a deed executed by a *arda Nashin* lady, must satisfy itself upon evidence—

(*i*) firstly, that the deed was actually executed by her or by some person duly authorised by her with a full understanding of what she was about to do ;

(*ii*) secondly, that she had full knowledge of the nature and effect of the transaction into which she is said to have entered ; and

(*iii*) thirdly, that she had independent and disinterested advice in the matter.

The *burden of proof* rests not with those who attack but with those who found their claim upon the deed and the proof must go so far as to show affirmatively and conclusively that the deed was not only executed but was explained to and was really understood by the lady and that the deed arose from the free and independent will of the lady.

Therefore the ordinary presumption that a person has understood the document which he has signed does not hold good in the case of *Parda Nashin* ladies and it must be proved by the party benefited.

There is no absolute law, however, that a deed executed by a *Parda Nashin* lady cannot stand unless it is proved that she had independent advice. When facts show that if independent advice which is essentially different from outside control had been obtained, the lady would have acted as she did, the deed ought to stand.

In *Kati Buksh Singh* v. *Ram Gopal Singh*, 36 Allah. 81 (P. C.) a *Pardanashin* woman executed a gift deed of a portion of her estate in favour of her paramour's son. A suit was brought for cancellation of the deed of gift. The findings of the trial court were that the deed in question was duly and pro-

perly executed, that the executant was competent to execute it and that it was read over and explained to her but it was not proved that the executant had independant advice in the matter. Their Lordships of the Privy Council observed. "There is no rule of law that a deed of gift executed by a *Pardanashin* lady cannot stand unless it is proved that the lady had independent advice. The possession of independent advice or the absence of it is a fact to be taken into consideration and well weighed on a review of the whole circumstances relevant to the issue whether the grantor thoroughly comprehended and deliberately of her own free will carried out the transaction." This case and the case of *Faridul Nisa* v. *Mukhtar Ahmad*, A. I. R. 1925 P. C. 204 were relied upon in another recent Privy Council case of *Sikander Begum* v. *Julfikarali Khan*, 1938 A. L. J. 176 (P. C.). The plaintiff, a *Pardanashin* lady, had executed a deed of gift in favour of her grandson on whom she had bestowed much love and affection. The deed was not an improvident document which the plaintiff, if adequately advised, could not properly have entered into. The plaintiff instituted the suit for a declaration that the said deed of gift was null and void inasmuch as amongst other reasons she could not get independent advice in respect of it. *Held*, upon the circumstances, that it was for the defendants in the action to discharge the onus of showing that the plaintiff really understood and intended to execute the deed of gift but it was not necessary to prove independent advice.

A woman who has no objection to communicate in matter of business with men other than members of her own family, to go to court and attend at the Registrar's office in person, cannot be regarded as a *Pardanahin* woman. (33 Cal. 773 (P. C.): 3 C. L. J. 484 (P. C.) : 10 C. W. N. 570).

Case. - Abdul Mannan v. Mutawalli of Sm. Janebali, A. I. R. 1956 Cal. 584—The plaintiff, an illiterate *Pardanashin* woman, executed a deed by which she purported to transfer her mutwalliship in favour of her Am mukhtear B who was in charge of her properties and was looking after her estate and litigations including various criminal litigations going on between the plaintiff and her husband. Thus B was in some sort of fiduciary relationship with the plaintiff and was in a position to dominate her will.

It was held by the Calcutta High Court :—

(a) that a heavy onus lay upon the contesting defendants who were setting upon the deed against the plaintiff to prove that it was validly executed so as to be binding against an illiterate *pardanashin* woman and the evidence will have to be scanned from that point of view in the light of the principles laid down in 1921 Cal. 203, 1525 P. C. 204, 1948 Cal. 84 and 1940 P. C. 147.

(b) that there was no proper or intelligent execution of the document by plaintiff.

Moreover *the deed itself was a deed of considerable disadvantage to the plaintiff, purporting as it did to divest her even of her ancestral residence.*

She was, again, transferring the mutwalliship to a person who would certainly be outside the line laid down by the founders.

These features of the disputed transaction would require the strongest evidence of intelligent execution on the part of the illiterate female executant in order to support the validity of the deed as against her.

(c) that, as the defendants had not discharged the onus that lay heavily upon them, the deed was not binding on the plaintiff.

Sub-section 2) :—Sub-section (2) of sec. 16 mentions the cases in which persons are deemed to be in a position to dominate the will of other. The cases are :—

(1) Where a person holds a real or apparent authority over the other, (*e. g.*, the money-lender and the borrower), he is deemed to be in a position to dominate the will of such other.

(2) Where a person stands in a fiduciary relation to the other (*e. g.*, father and son), he is deemed to be in a position to dominate the will of such other.

(3) Where a person makes a contract with another person whose mind is enfeebled by physical or mental distress ; then he is deemed to be in a position to dominate the will of the person with such enfeebled mind.

The court will not necessarily set aside a gift or promise made by a child to its parents, by a client to his lawyer, by a patient to his doctor, by a *cestui que trust* (beneficiary under a trust) to his trustee, by a ward to his guardian, or by a disciple to his spiritual adviser ; but transactions between such persons call for proof that the party benefited did not take advantage of his position. The person who holds position of influence is under a duty to prove that the transaction was fairly conducted as if between strangers, that the weaker was not unduly impressed by the natural influence of the stronger.

A, a man enfeebled by disease or age, is induced, by B's influence over him as his medical attendant, to agree to pay B an unreasonable sum for his professional services, it is presumed that B exercised undue influence. The onus on B to prove that the agreement was not so induced.

A spend-thrift just come of age who was a weak minded youth conveys a share of his family property to his father-in-law for *nominal* consideration. It can be presumed that undue influence has been exercised. (*Ramakrishna* v. *Parmeswara*, (1931) M. W. N. 215'.

Sub-section (3) :—Sub-section (3) of section 16 lays down a rule of evidence that where a person who is shown to be in a position to dominate the will of another enters into a contract with such person and the transaction appears to be unconscionable, a presumption of undue influence arises, and the burden of proving that such contract was not induced by undue influence shall be upon the person in a dominating position. This sub-section deals with the following three matters :—

(i) In the first place, the relations between the parties must be such that one is in a position to dominate the will of the other.

(ii) Once the above position is established, the second issue comes whether the contract has been induced by undue influence.

(iii) Upon the determination of the second issue, a third point emerges and that is the burden of proving that the contract was not induced by undue influence, and this burden lies upon the person who was in a position to dominate the will of the other.

In order to establish undue influence, the first necessary thing to establish is to show that one party was in a position to dominate his will upon the other party and did exercise dominion and, secondly, that the transaction was unconscionable.

The reason for the rule in this sub-section is that a person who has obtained an advantage over another by dominating his will, may also remain in a position to suppress the requisite evidence in support of the plea of undue influence. (*Ladli Prashad Jaiswal* v. *Karnal Distillery Co. Ltd. A. I. R. 1963* S. C. 1279).

The following four important questions which the Court should consider in dealing with cases of undue influence, have been laid down by Lord Macnaghten in the case of *Mahomed Buksh v. Hosseini Bibi*, (1888) 15 Cal. 684.

(i) Whether the transaction is a righteous transaction, *i. e.* whether it is a thing which a right-minded person might be expected to do ;

(ii) Whether it was improvident *i. e.*, whether it shows so much improvidence as to suggest the idea that the donor was not master of himself and not in a state of mind to weigh what he was doing ;

(iii) Whether it was a matter requiring a legal adviser ; and

(iv) Whether the intention of making the gift originated with the donor.

Unconscionable transaction :—A bargain is unconscionable when it is such that no man in his senses and not under delusion would make on the one hand and no honest and fair man would accept on the other.

Problems (i)—X, a powerful and wealthy banker, obtained from a young zamindar who had just attained majority a bond for Rs. 10,000 by threats of prolonging a litigation commenced against him by other persons with the funds and the assistance of the banker. When he executed the bond, the zamindar had no independent advice.

X could not succeed on the bond because the transaction is unconscionable.

(ii) A, poor Hindu widow, borrowed money from S. a money-lender, at the rate of 100 per cent. S filed a suit for recovery of the amount advanced by him with interest at the contract rate.

The mere fact that the rate of interest in the money lending transaction is exorbitant is no ground for avoiding the contract in toto by A. Urgent need of money by the borrower does not, by itself, place the lender in a position to dominate his will under Section 16. The widow has wilfully entered into the bargain and therefore she cannot be protected.

Where a poor widow borrowed certain amount from a money-lender at 100 per cent per annum for the purpose of enabling her to establish her right to maintenance, the Madras High Court allowed the lender interest at 24 P.C.

and held that the contract could not be wholly avoided. (*Ranee Annapuri* v. *Swaminatha*, (1910) 34 Mad. 7).

Difference between Coercion and undue influence.—The following are the points of distinction between the two :—

(i) In the case of undue influence, the consent is obtained by dominating the will and is given under the impression that the giver will not be put to a loss while, in the case of coercion, the consent is obtained by threat of an offence and hence the person is forced to give the consent.

(ii) Coercion is mainly of a physical nature while undue influence, of a moral nature. In other words, coercion is violent in nature while undue influence is more subtle and intangible.

Under section 123 (2) of the Representation of the People Act 1951, a candidate may be guilty of corrupt practice if he uses undue influence which, in the words of the section, means any direct or indirect interference or attempt to interfere with the free exercise of any electoral right of a voter.

There should be a pleading in the election petition with regard to the plea of undue influence. In order that a pleading may be sufficient to make out a case of undue influence, it must set out full particulars of it under the provisions of section 83 (1) (c) of the Act which may be compared with Order 6, Rule 4 of the Code of Civil Procedure. The said provision of the Act read with section 123 (2) of the Act makes it obligatory on a party setting up a case of corrupt practice by exercise of undue influence, to give full particulars thereof by stating, *inter alia*,—

(a) who attempted to induce electors to believe that the voting for a particular person would render them objects of divine displeasure or spiritual censure ; and

(b) in what manner such attempts were made.

Effect of undue influence on the contract.—When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused.

Any such contract may be set aside either absolutely or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the Court may seem just. (Sec. 19-A of the Indian Contract Act).

Illustrations.—(a) A's son has forged B's name to a promissory note. B, under threat of prosecuting A's son, obtains a bond from A ofr the amount of the forged note. If B sues on this bond, the Court may set the bond aside.

(b) A, a money-lender, advances Rs. 100 to B, an agriculturist, and, by undue influence, induces B to execute a bond for Rs. 200 with interest at 6 percent per month. The Court may set the bond aside, ordering B to repay the Rs. 100 with such interest as may seem just.

(a) A further and better statement of the nature of the claim or defence ; or

(b) further and better particulars of any matter stated in any pleading.

may, in all cases, be ordered upon such terms as to costs and otherwise, as may be just. (O. 6, R. 5).

If the pleading is vague, defective or incomplete, the opposite party may apply to the court for further particulars under Rule 5 of Order VI. Application for further particulars under Rule 5 of Order VI should be made when the pleading is vague and does not give sufficient details to the opposite party to set up his case.

The Court may allow an application for particulars presented at any stage, though, as a general rule, it should be made with reasonable promptitude. The Court may, in its discretion, order the defendant to file his written statement before particulars are given or it may order the same to be filed after the written statement has been filed. Where the defendant knows certain facts and the plaintiff does not know them, the defendant should give discovery before the plaintiff delivers particulars.

Having regard to the nature and form of an affidavit in support of a Caveat, an application for further and better particulars under Order 6, Rule 5 does not lie. (*Husein Abdul Karim Panju* v. *Mrs. Mariambai Abdul Rahim*, A. I. R. 1973 Bom. 175 (S. J.)= 74 Bom. 840).

The Court may impose any terms it pleases to the furnishing of particulars. For instance, it may order that the suit shall stand dismissed or that the vague allegations will be struck out and evidence not allowed if the particulars are not furnished within the time allowed. The Court may also allow costs.

Problems.— *i) A deals in drugs bearing the registered trade mark 'Herbaline'. B uses the word 'Herbaline' on drugs manufactured by him. A sues B for infringement of his trade mark, alleging in his plaint that the use of his trade mark by B is calculated to induce, and had, in fact, induced, "diverse persons" to purchase B's goods as and for A's goods. B applies for particulars of the names and addresses of the "diverse persons."*

B is entitled to particulars because the names and addresses of 'diverse persons' form part of material facts which constitute A's case because the whole question is "Has the defendant induced 'diverse persons' to buy his goods as and for those of the plaintiff?"

(ii) A lets out his land to B for cultivation under a written lease for 10 years. The lease contains a covenant that B will not sell hay and straw from the leased land nor remove manure therefrom nor allow it to remain uncultivated. A files a suit for ejectment against B, stating generally in the plaint that B has rendered himself liable to ejectment for having broken the terms of the covenant contained in the lease.

In this case, the following particulars would be asked :—

(1) Which terms of the covenant contained in the lease have been broken ?

(2) How have they been broken ?

Advantage of asking for particulars.—(1) These enable the party asking for them to know what case he has to meet at the trial and save unnecessary expense and avoid allowing parties to be taken by surprise.

(2) They pin the party required to give particulars to a definite story, otherwise it will be open for him at the trial to give evidence of any fact which lends support to his vague allegation.

Legal effect of answers given, upon party giving them.—The legal effect of the answers given upon the party giving them is that he is bound by them and is not entitled to go at the trial into any matters not included in them.

Effect of disobedience of order for particulars.—Where the party called upon to supply particulars does not do so, then, in case of default of the plaintiff, his suit is stayed and can be even dismissed if the Court thinks fit, and, in the case of default of the defendant, his defence is struck out.

Leave for asking particulars when refused.—Leave for asking particulars may be refused—

(a) where it would be oppressive or unreasonable ;

(b) if particulars are required of an allegation which is immaterial ;

(c) if particulars are required not of material facts but of evidence of material facts.

Particulars can be given only of an affirmative allegation and not of mere denial.

Condition precedent.—Any condition precedent, the performance or occurrence of which is intended to be contested, shall be distinctly specified in his pleading by the plaintiff or defendant, as the case may be.

An averment of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant shall be implied in his pleading. (O. 6, R. 6 .

For instance, in a suit against the Government, it is necessary to allege in the plaint that a notice under section 80, Civil Procedure Code was duly given. Similarly, it is necessary to plead notice under Section 111 of the Transfer of Property Act in a suit for ejectment.

The principle laid down in Order 6, Rule VI is the exception to the general rule that all material facts, and material facts only, should be pleaded. A condition precedent is a condition the fulfilment or performance of which gives rise to a right or liability and if the condition is not performed, any right or liability does not arise.

A agrees to build a house for B at certain rates. It is a condition of the contract that payment should only be made upon a certificate of B's architect that so much is due. In a suit for money due to A, the obtaining of the said certificate is a condition precedent to A's right of action. It is not necessary for A to allege that he has obtained the certificate. If B intends to contest the fulfilment of this condition, he should distinctly plead it.

Where, however, a plaintiff is conscious that he has not performed a condition and has good excuse for such non-performance, he may, in his plaint, state the condition, the non-performance and the facts which afford him excuse, e. g., that the defendant prevented or discharged him from performing it.

Section 80 of the Code of Civil Procedure lays down that no suit shall be instituted against—

(i) the Government (including the Government of the State of Jammu and Kashmir) ; or

(ii) a public officer in respect of any act purporting to be done by such public officer in his official capacit y,

until the expiration of 2 months next after notice in writing has been —

(i) delivered to, or

(ii) left at the office of,

(a) in the case of a *suit against the Central Government except where it relates to a Railway*,

a Secretary to that Government ;

(b) in the case of a *suit against the Central Government where it relates to a Railway*,

the General Manager of that Railway ;

(bb) in the case of a *suit against the Government of the State of Jammu and Kashmir*,

(i) the Chief Secretary to that Government, or

(ii) any other officer authorised by that Government in this behalf ;

(c) in the case of a *suit against any other State Government*,

(i) a Secretary to that Government, or

(ii) the Collector of the District ; and

(d) in the case of a public officer,

such public officer.

Such notice shall state—

1. the cause of action,

2. the name, description and place of residence of the plaintiff, and

3. The relief which he claims.

The plaint shall contain a statement that such notice has been so delivered or left.

A notice under section 80 of the Code of Civil Procedure may be construed as a combined notice under both section 77 of the Indian Railways Act and section 80 of the Civil Procedure Code. (*Moolji Bhai Maneklal & Co.* v. *Dominion of India*, A. I. R. 1952 Nag. 22 : I. L. R. (1952) Nag. 821 ; *Dharamsi* v. *Union of India*, A. I. R. 1952 Cal. 439 : I. L. R. (1952) 2 Cal. 205 ; *M. Ramamurthi* v. *Union of India*, Unreported Judgment in 1955 Andh. L. T. (N. R. C.) 67 ; *Dasa K. Lakshmiah* v. *Union Government*, A. I. R. 1969 A. P. 386 (S. J.)).

In *Governor General-in-Council* v. *G Sankerappa*, A. I. R. 1953 Mad. 838 : (1953) 2 M. L. J. 76, a notice under section 80, Civil Procedure Code, claiming damages for loss of goods in railway transit, was sent to the Member-in-Charge of the Railway Board as the competent authority to deal with the matter. This notice was forwarded by the Railway Board to the General Manager, Madras and South Maratha Railway as the competent

authority to deal with the matter. It was *held* that the notice was proper notice under section 80 C. P. C. (*See also Ramaswami* v. *Secretary of State*, A. I. R. 1933 Mad. 105 : 36 Mad. L. W. 694 ; *Governor-General of India in Council* v. *Krishna Shenoy*, A. I. R. 1951 Mad. 327 : (1950) 2 M. L. J. 506 ; *Subramanyam* v. *Union of India*, A. I. R. 1951 Mad. 416 : (1950) 2 M. L. J. 656 ; *Bholaram Shiubdhan* v. *Governor-General-in Council*, A. I. R. 1949 Pat. 416 ; *Sankunni Menon* v. *South Indian Railway*, A. I. R. 1952 Mad. 502 : (1951) 1 M. L. J. 463).

In a Supreme Court case of *Jetmull Bhojraj* v. *D. H. Railway*, A. I. R. 1962 S. C. 1879 : (1963) 2 S. C. R. 832, the question was whether the requirements of section 77 of the Railways Act were complied with by sending a letter. Their Lordships of the Supreme Court held by a majority judgment as follows :—

"The High Courts in India have taken the view that the object of service of notice under this provision is—

(a) essentially to enable the railway administration to make an enquiry and investigation as to whether the loss, destruction or deterioration was due to—

(i) the consignor's laches, or

(ii) the wilful neglect of the railway administration and it servants; and

(b) further to prevent stale and possibly dishonest claims being made when owing to delay, it may be practically impossible to trace the transaction or check the allegations made by the consignor. (See *Shamshul Huq* v. *Secretary of State*, A. I. R. 1930 Cal. 332 : I. L. R. 57 Cal. 1286 ; *Mahadeva Ayyar* v. *South Indian Railway Co.* A. I. R. 1922 Mad. 362 (F. B.) I. L. R. 45 Mad. 135 *Governor-General-in-Council* v. *Gouri Shanker Mills Ltd.*, A. I. R. 1949 Pat. 347 (F. B.) : I. L. R. 28 Pat, 178 ; *Meghji Hirjee & Co* v. *Bengal Nagpur Railway*, A. I. R. 1939 Nag. 141 : 1939 Nag. L. J. 124).

Bearing in mind the object of the Section, it has also been held by several High Courts that a notice under Section 77 should be liberally construed.

In our opinion, that would be the proper way of constituting a notice under that section. In enacting the Section, the intention of the Legislature must have been to afford only a protection to the railway administration against fraud and not to provide a means for depriving the consignors of their legitimate claims for compensation for the loss of or damage caused to their consignments during the course of transit on the railways."

It was held in this Supreme Court case that a letter is sufficient compliance with the requirements of section 77 of the Railways Act.

This principle equally applies to the construction of the notice under Section 80, C. P. C.

(**6**) **Departure.**—No pleading shall, except by way of amendment,—

(a) raise any new ground of claim ; or

(b) contain any allegation of fact,

inconsistent with the previous pleadings of the party pleading the same. (O. 6, R. 7).

(7) **Denial of contract.**—Where a contract is alleged in any pleading, a bare denial of the same by the opposite party shall be construed only as a denial in fact of the express contract alleged or of the matters of fact from which the same may be implied, and not as a denial of the legality or sufficiency in law of such contract. (O. 6, R. 8).

All matters which go to show that the contract sued upon is void or unlawful, must be specifically pleaded. In other words, when the defendant relies on the fact that the contract is illegal or insufficient in law to give rise to any right or liability, a specified *plea* of illegality or insufficiency of the contract must be taken and the facts showing that the contract is illegal or insufficient in law, must be specifically alleged.

(8) **Implied contract or relation.**—Whenever any contract or any relation between any persons is to be implied from—

(a) a series of letters, or

(b) a series of conversations, or

(c) otherwise from number of circumstances,

it shall be sufficient—

(a) to allege such contract or relation as a fact, and

(b) to refer generally to such letters, conversations or circumstances without setting them out in detail.

If, in such case, the person so pleading desires to rely *in the alternative* upon more contracts or relations than one as to be implied from such circumstances, he may state the same in the alternative. (O. 6, R. 12).

If you refer to the letters, the dates should be given. If you refer to conversation, it should be specified as to when, between what parties and at what place did the conversations take place.

(9) **Statement of effect of document.**—Wherever the contents of any document are material, it shall be sufficient in any pleading to state the effect thereof as briefly, as possible, without setting out the whole or any part thereof, unless the precise words of the document or any part thereof are material. (O. 6, R. 9).

Where, in an election matter,—

(a) the plea in essence was that the cars were used for the purpose of conveying voters contrary to the prohibition contained in the Election Law ;

(b) the names of the booths and the divisions in which the booths were situated, together with the particulars of the cars and the persons primarily concerned with cars at the polling booths have been mentioned ;

(c) the drivers of the cars or the voters themselves have not been examined ;

(d) it has been sufficiently pleaded and proved that the cars were in fact used ;

(e) the connection of the candidate declared elected with the use of the cars has been specifically pleaded,

it must be held that—

(i) The rest are the matters of evidence which do not require to be pleaded, and that plea can always be supported by evidence to show—

1. the source from where the cars were obtained ;
2. who hired or procured them ; and
8. who used them for the conveyance of the voters.

(i) The circumstantial chain of evidence may be sufficient to show the connection between the elected candidate and the use of cars for the conveyance of the voters.

(iii) Each case is decided on its own facts and circumstances. It is true that better particulars can only be given by the party, but that is only where better particulars are required.

(10) Allegation of malice, knowledge, etc.—Wherever it is material to allege—

(a) malice,
(b) fraudulent intention,
(c) knowledge, or
(d) other condition of the mind,

of any person, it shall be sufficient to allege the same as a fact without setting out the *circumstances* from which the same is to be inferred. (O. 6, R. 10).

So, if you have to plead the condition of mind, the same should be alleged as a fact without marrating the details how it arose, *e. g.*, "the defendant was actuated by malice in prosecuting the plaintiff" or the said representation was false and was known by the defendant to be false and was made by him with intent to deceive the plaintiff."

Order 6, Rule 10 gives the manner in which malice, etc., of a person should be pleaded. The *reason* of the rule is that the circumstances will be no more than evidence of the facts.

In a *suit for malicious prosecution*, the plaintiff should only allege in the plaint that the defendant was actuated by malice in prosecuting him. He should not allege that he had previously given evidence against the defendant and the defendant had vowed to take revenge, though he can give evidence to prove these facts.

In a suit against a defendant on whose representation of A's solvency the plaintiff sold goods on credit to A, it is sufficient to allege that the said representation was false and was then known by the defendant to be so and was made by him with intent to deceive and defraud the plaintiff. No facts or circumstances from which the plaintiff has drawn this conclusion need be pleaded. But this does not mean that full particulars of the fraud should not be given. It is not sufficient to say that the defendant committed a fraud. Particulars as to the nature of the fraud and how it was committed must be alleged but not the evidence by which it is intended to be proved.

In a case for *damages for the bite of the defendant's dog*, it is enough to plead that the defendant knew that the dog was of a ferocious and mischievous nature. It need not be alleged that on a former occasion also, the dog had bitten another man in the presence of the defendant, or that another man had warned the defendant of the nature of the dog, because all these facts will be mere evidence of knowledge.

Wherever it is material to allege *notice* to any person of any fact, matter or thing, it shall be sufficient to allege such notice as a fact, unless—

(a) the form or the precise terms of such notice, or

(b) the circumstances from which such notice is to be inferred,

are material. (O. 6, R. 11).

In other words, wherever the law only imposes a liability upon a party if he has notice of a fact, it is necessary to plead that he had notice.

The fact of notice should be alleged as a fact without stating the circumstances from which the same may be inferred but where the precise terms of notice are material, they should be alleged.

For example, in a notice under Section 111 of the Transfer of Property Act, it should be pleaded that "On November 11, 1957, the plaintiff served upon the defendant notice calling upon him to vacate the premises and deliver possession to him on the expiry of 30th November, 1957".

The object of the notice under section 80, Civil Procedure Code, is to give to the Government or the public servant concerned an opportunity to reconsider its or his legal position and if that course is justified to make amends or settle the claim out of court. The section is, no doubt, imperative, and failure to serve notice complying with the requirements of the statute will netail dismissal of the suit. But the notice must be reasonably construed. Any unimportant error or defect cannot be permitted to be treated as an excuse for defeating a just claim.

In considering whether the provisions of the statute are complied with, the court must take into account the following matters in each case :—

(1) whether the name, description and residence of the plaintiff are given so as to enable the authorities to identify the person serving the notice ;

(2) whether the cause of action and the relief which the plaintiff claims, are set out with sufficient particularity ;

(3) whether a notice in writing has been delivered to or left at the office of the appropriate authority mentioned in the section ; and

(4) whether—

(a) the suit is instituted after the expiration of 2 months next after notice has been served, and

(b) the plaint contains a statement that such a notice has been so delivered or left.

In construing the notice, the court cannot ignore the object of the legislature, viz., give to the Government or the public servant concerned an opportunity to reconsider its or his legal position. If, on a reasonable reading of the notice, the plaintiff is shown to have given the information which the statute requires him to give, any incidental defects or irregularities should be ignored.

Section 80, C. P. C. requires, among other things, that the notice must state the name, description and place of residence of the plaintiff.

Where—

(a) the notice purports to emanate from M/S. Raghunath Dass Mulkraj ;

(b) in the body of the notice in several places, the expression 'we' is used ;

(c) the plaintiff had purported to sign for M/S. Raghunat h Dass Mulkraj, but, at the same time, he signed the notice as the proprietor of the concern "Raghunath, Dass Mulkraj",

that is a clear indication of the fact that Raghunath Dass Mulkraj is a proprietary concern and the plaintiff is its proprietor.

Whatever doubts that may possibly be created in the mind of the recipient of the notice, after going through the body of the notice as to the identity of the would-be plaintiff, the same can be resolved after going through the notice as a whole.

Where, in the plaint, the plaintiff definitely stated that he was carrying on his business under the name and style of Raghunath Dass Mulkraj, meaning thereby that the concern known as 'Raghunath Dass Mulkraj' is a proprietary concern and the name given to it is only a trade name, and that he had given a notice under Section 80, C. P. C., but, in the written statement filed on behalf of the Dominion of India, the validity of the notice issued was not challenged but it was stated in the written statement that suit is barrede by Section 80, C.P.C. as no notice under that section appears to have been servd on this administration, it follows from this that the Dominion of India did not challenge the validity of the notice as the notice sent by the plaintiff had been served on the authorities concerned. Therefore, the fact that the defendant did not object to the validity of the notice in its pleading, shows that it never considered the person who brought the suit, as being someone other than that who issued the notice.

The object of the notice contemplated by Section 80, C. P. C., is to give to the concerned Governments and public officers, opportunity to reconsider the legal position and to make amends or settle the claim, if so advisd without litigation. The legislative intention behind that section is that public money and time should not be wasted on unnecessary litigation, and the Government and the public officers should be given a reasonable opportunity to examine the claim made against them lest they should be drawn into avoidable litigations. The purpose of law is advancement of justice. The provisions in Section 80, Civil Procedure Code, are not intended to be used as boobytraps against ignorant and illiterate persons.

The question whether the person mentioned in the notice as plaintiff has brought the suit or he is someone else, has to be decided by reading the notice as a whole in a reasonable manner. In *Dhian Singh Sobha Singh* v. *Union of India*, A. I. R. 1958 S. C. 274 : 1958 S. C. R. 781, the Supreme Court observed that. while the terms of Section 80 of the Civil Procedure Code must be strictly complied with, that does not mean that the terms of the Section should be construed in a pedantic manner or in a manner completely divorced from common-sense.

In the case of *S. N. Dutt* v. *Union of India*, A. I. R. 1961 S. C. 1449: (1962) 1 S. C. R. 560, a notice was sent by lawyer on behalf of the concern known as S. N. Dutt & Co. The notice did not indicate, either specifically or by necessary implication, that the concern was a proprietary concern and

S. N. Dutt was its sole proprietor. Referring to the notice, the Supreme Court observed that the *prima facie* impression from reading t e notice was that Messrs. S. N. Dutt & Co. was some kind of partnership firm and notice was being given in the name of that partnership firm, and, therefore, it cannot be said, on a comparison of the notice with the plaint, that there was identity of the person who issued the notice with the person who brought the suit. Further, in that case, the defendant challenged the validity of the notice right from the beginning.

Section 80, C. P. C., is mandatory. (*State of Madras* v. *C. P. Agencies*, A. I. R. 1960 S. C. 1309). But in *Dhirendra Nath Gorai* v. *Sudhir Chandra Ghosh*, A. I. R. 1964 S. C. 1300 · (1965) 6 S. C. R. 1001, the Supreme Court has cited with approval the case of *Vellayan Chettiar* v. *Government of Madras*, A. I. R. 1947 P. C. 197 at page 199 : 74 I. A. 223 at page 228, where the Privy Council held the provisions of section 80, C. P. C., though mandatory, waivable by the authority for whose benefit they are provided.

It indicates that a notice under section 80, C. P. C., cannot be a jurisdictional condition, and, when it is said that such notice may be waived by the Government, it becomes obvious that the inherent jurisdiction of the court is not dependent on it.

It has been held in the case of *Nani Amma Nandini Amma* v. *State of Kerala*, A. I. R. 1963 Ker. 114, 1962 Ker. L. J. 1267, that—

(a) Section 80, C. P. C., is not a provision of public policy but one for the benefit of particular parties who are competent to waive or disregard it.

(b) Therefore, the requirements of the notice and expiry of a particular period thereafter are not jurisdictional facts, for jurisdiction cannot be dependent on the consent or waiver of a party.

In the case of *Hirachand Himatlal Marwari* v. *Kashninath Thakurji Jadhav*, A. I. R. 1942 Bom. 339 (D. B.) : 44 Bom. L. R. 727, it was observed by the High Court :—

"It is open to the party protected by Section 80 to waive his rights, and his waiver binds the rest of the parties.

But only he can waive notice, and, if that is so, it is difficult to see any logical basis for the position that a party who has himself no right to notice, can challenge a suit on the ground of want of notice to the only party entitled to receive it."

This Bombay decision has been cited with approval in the case of *Gaja* v. *Dasa Koeri*, A. I. R. 1964 All. 471 : 1964 A. L. J. 969, as holding that a party who has himself no right to notice, cannot challenge a suit on the ground of want of notice.

In the case of *Raghubans Sahai* v. *Ful Kumari*, [1905] I. L. R. 32 Cal. 1130 (D. B.) : 1 Cal. L. J. 542, the first contention of the appellant was that the Secretary of State is a necessary party to the suit and, as the notice mentioned in Section 424 of the Civil Procedure Code was not served upon him in time, the suit was improperly instituted and ought to be dismissed. It was observed by the Calcutta High Court :—

"As regards the first contention advanced on behalf of the appellant, reliance is placed upon the decision of this court in the case of *Gobinda Chandra Saha* v. *Hemanta Kumari Debi*, I. L. R. (1904) 31 Cal. 159 : 8 C. W. N. 657,

which is clearly distinguishable. That case is an authority for the proposition that, in a suit to set aside a sale effected under the provisions of the Public Demands Recovery Act, 1895, the Secretary of State for India in Council is a necessary party.

In the case before us, the Secretary of State was joined as a party. The only objection is that the notice required by Section 424 of the Civil Procedure Code was not served upon him two months before the institution of the suit. This objection ought not to prevail for two reasons—

(i) In the first place, this objection can be taken only by the Secretary of State for whose benefit the notice is intended.

Although the objection was taken on his behalf in the Court of first instance and was overruled, the objection has not been pressed by him in this Court ; indeed, although the point was decided against the Secretary of State by the first Court, no appeal was preferred by him and, though he was a party respondent to this appeal, he has not chosen to enter appearance.

(ii) In the second place, Section 424 of the Civil Procedure Code requires that the notice must state the cause of action and the relief claimed by the plaintiff.

In the present case, however, no relief is claimed by the plaintiff on the ground of fraud against the Secretary of State and no fraud is charged against him, and, consequently, there can be no cause of action against him based on the ground of fraud. Under these circumstances, it would be impossible to serve a notice fulfilling the requirements of section 424.

This view receives some support from the case of *Shahebzadee Shahunshah Begum* v. *Fergusson*, I. L. R. (1881) 7 Cal. 499, where Cunningham, J., held that the intention of Section 424 is to give to the Government as represented by the Secretary of State and to the servants of Government in the discharge of their public duties, the same protection as English Statutes confer on many public officers and bodies, namely, that when it is alleged that they have committed an illegality in the discharge of their duties, they shall have time and an opportunity of making amends before the matter is brought into Court.

This is also in accordance with the decision in the case of *Muhammad Saddiq Ahmad* v. *Panna Lal*, I. L. R. (1904) 26 All. 220 : 1903 All. W. N. 211.

The first objection, therefore, taken by the appellant on the ground that the notice was not served in time on the Secretary of State, must be overruled."

In the case of *Bhola Nath Roy* v. *Secretary of State for India*, I. L. R. (1913) 40 Cal. 503 : 17 C. W. N. 64 (D. B.), the first defendant to the suit was the Secretary of State for India in Council. In his Written Statement, he urged that the notice under section 80 of the Code of Civil Procedure served by the plaintiffs was not sufficient, proper and in accordance with law. On the 2nd May, 1910, the court framed 7 issues which did not include an issue upon the question of the legality, validity and sufficiency of the notice under Section 80. The suit came up for trial on the 13th January, 1911, after certain interlocutory proceedings. On that date, the 2nd defendant prayed that a new issue might be raised and, upon that, an additional issue on the legality, validity and sufficiency of the notice was raised. The Court of first instance decreed the suit in favour of plaintiffs. On appeal by the defendants, the District Judge held the notice not valid and reversed the decree and returned the plaint to the plaintiffs. On further appeal by plaintiffs, the Calcutta High Court *held* :

"Although, in the first paragraph of the written statement of the Secretary of State for India in Council, an objection was taken to the validity of the notice, no issue was raised upon the point. We must assume that the issues were framed in the presence of the parties or their representatives. At any rate, they had notice of the date when the issues would be settled by the court, and it was incumbent upon them to be represented on the occasion.

But even if it be assumed that the issues were framed in the absence of the Government Pleader, it is plain that he might have taken exception to the issues as framed and asked the Court to frame an additional issue. No objection, however, was taken by him at any stage of the trial in the court of first instance. It was the second defendant who prayed, just before the trial began, that an additional issue might be raised upon the question of the validity of the notice. But it was clearly incompetent to the second defendant to raise the question.

As was pointed out by this Court in *Manindra Chandra Nandi* v. *Secretary of State for India*, [1907] 5 Cal. L. J. 148 : I. L. R. 34 Cal. 257,—

(a) it is competent for the Secretary of State to waive the notice, and

(b) he may be estopped by his conduct from pleading the want of notice at a late stage of the trial.

In the events which have happened, we are clearly of opinion that, in this case, notice was waived on behalf of the Secretary of State, and that the question could not have been raised by the 2nd defendant.

The result is that—

(a) this appeal is allowed ;

(b) the decree of the District Judge is set aside ; and

(c) the case is remanded to him in order that the appeal may be heard on the merits."

Therefore, where—

(i) The State had taken exception to the maintainability of the suit for want of two months' notice under Section 80 C. P. C.;

(ii) The District Judge on appeal has overruled it ;

(iii) Although the State is a party to this appeal, it has not objected to that finding,

it must be deemed to have waived its objection to the maintainability of the suit for insufficiency of Section 80 notice.

It is not open to the other defendant to take the string and urge the contention as the benefit of the section is available only to the State and its officers and to none other. To allow the other defendant appellant to urge a defence that the State only could have taken, is to allow a party *to fight the case of another* which would offend the principle *tabooing defence of jus tertii*.

It is an elementary rule in judicial proceedings that nobody can plead jus tertii as a defence. The object of section 80, C. P. C. is only to give the Government notice of the suit proposed to be brought against it so that it may decide for itself whether the claim of the plaintiff should be accepted or resisted. The benefit of Section 80 is only to the Government and its officers, and not to private parties. It cannot then be availed of by a private party who is made a defendant to the suit along with the State.

The plaint as a whole ought not to be rejected and the suit can be allowed to proceed against the defendants other than those to whom a notice under section 80, C. P. C. has to be given but was not given. (*Shankarrao Balaji* v. *Shambihari*, A. I. R. 1951 Nag. 419 : I. L. R. (1949) Nag. 560 ; *Mst Chandani* v. *Rajasthan State*, A. I. R. 1962 Raj. 36 : I. L. R. (1961) 11 Raj. 1133 ; *Ram Charan* v. Custodian, Evacuee Property, A. I R. 1965 Pat. 275 : 1964 B.L.J.R. 291; *M. G. Tipnis* v. *The Secretary, Ministry of Commerce*, A. I. R. 1970 Madh. Pra. 5 (D. B.) : 1969 M. P. L. J. 639 M. P. W. R. 633 : 1969 Jab. L. J. 922 .

Problem.—The suit was instituted on 20-7-1954 against the State of Madhya Pradesh by Raghubir and his three grandsons (all the divided members of the Hindu joint family). Raghubir's son Rajendra was a pro forma defendant. A notice under section 80, C. P. C., had been given by Raghubir who was the karta of the undivided joint family on 11-1-1954. Plaintiffs A, B and C (the grandsons of Raghubir) were joined as plaintiffs because, in a partition made subsequent to the giving of the notice, they were each entitled to 1/5 share along with plaintiff No. 1 (Raghubir). Rajendra was joined as a defendant because he did not choose to join as the plaintiff. The plaintiffs sought a declaration that—

(a) the three nazul plots in suit had been in possession of the plaintiffs and their predecessors in their own right from time immemorial ;

(b) their status was that of a Raiyat Sarkar ; and

(c) the order of the State Government in the survey and Settlement Department refusing to recognise their possession over the plots was wrong and *ultra vires*.

Between 11-1-54 and 20-7-54, there was a disruption of the joint family of which Raghubir was a Karta.

The question is whether the notice is in conformity with section 80 of the Civil Procedure Code.

Solution.— The question to be considered is whether the notice given under section 80 of the Civil Procedure Code by plaintiff No. 1 (Raghubir) only was effective only with regard to Raghubir and ineffective with regard to the other plaintiffs and, therefore, Raghubir alone was entitled to a declaration as regards the 1/5th share of the disputed plot.

There is substantial identity between the person giving the notice, and the persons filing the suit. At the time of giving notice, the first plaintiff Raghubir was admittedly the eldest member of the joint family and, being a karta, was entitled to represent the joint family in all its affairs. The cause of action had accrued at the time of giving of the notice, and it was not necessary to give a second notice merely because there was a severance of the joint family before 20-7-54 when the suit was actually instituted.

It is obvious that the notice was given by Raghubir as a representative of the joint family and, in view of the subsequent partition, the suit had to be instituted by all the divided members of the joint family.

I am of the opinion that the notice given by Raghubir on 11-1-1954 was sufficient in law to sustain the suit brought by all the divided coparceners who must be deemed to be as much the authors of the notice as the karta who the actual signatory of the notice.

(11) **Presumption of law.** Neither party need, in any pleading, allege any matter of fact—

(a) which the law presumes in his favour ; or

(b) as to which the burden of proof lies upon the other side.

unless the same has first been specifically denied (e. g., consideration for a bill of exchange where the plaintiff sues only on the bill and not for the consideration as a substantive ground of claim). (O. 6, R. 13).

Thus, the pla intiff need not allege in the plaint the facts which are presumed in his favour.

For example, it is sufficient to allege the execution of a promissory note because there is a presumption under Section 118, Negotiable Instruments Act that it was executed for consideration. It follows as a corollary to this proposition that a person need not allege facts as to which burden of proof lies on other party. For example, the plaintiff need not allege that the defendant executed the bond of his own free-will without coercion, etc. It is for the defendant to allege any of these grounds if he wants to rely upon it. But if the suit is to enforce a bond executed by a *pardanashin* lady it is necessary to allege that she executed it of her own free-will.

Wherever there is an *exception* to a general legal rule, every fact which will bring a case within the exception or which will prevent the exception from applying, will be material and sho ld be stated.

Any *custom* which varies the ordinary law must be pleaded.

In cases coming under the rules of some particular school of Hindu or a Mohammedan Law, it will be material to plead the fact or facts which will cause those rules, and not the ordinary rules of Hindu or Mohammedan Law, to apply.

(12) **Signatures on pleadings.**—Every pleading shall be signed by the party and his pleader (if any).

But where a party pleading is, by reason of absence or for other good cause, unable t o sign the pleading, it may be signed by any person duly authorized by him to sign the same or to sue or defend on his behalf. (O. 6, R. 14).

Where there are many parties, they all should sign the plaint.

If the parties are unable to sign due to absence or other good cause, their agent may sign on their behalf.

The *object of the signature* is to show that the plead ing was filed with the party's knowledge and approval.

In any *suits by or against the Government*, the plaint or written statement sha ll be signed by such person as the Government may, by general or special order, appoint in this behalf. (O. 27, R. 1).

In *suit by or against a corporation*, any pleading may be signed on behalf of the corporation by—

(a) the Secretary of the corporation ; or

(b) any Director of the corporation ; or

(c) other principal officer of the corporation who is able to depose to the facts of the case. (O. 29, R. 1).

Where persons sue or are sued *as partners in the names of their firm*, it suffices if the pleading or other document is signed by any of such persons. (O. 30, R. 1 (2)).

(13) *Verification of pleadings*.—Save as otherwise provided by any law in force, every pleading shall be verified at the foot by—

(a) the party or one of the parties pleading ; or

(b) some other person proved to the satisfaction of the court to be acquainted with the facts of the case.

The person verifying shall specify, by reference to the numbered paragraphs of the pleading, what he verifies—

(a) of his own knowledge ; and

(b) upon information received and believed to be true.

The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed. (O. 6, R. 15).

Verification may be made—

(i) by the parties ;
(ii) if the parties are more than one, by one of the parties or by any one acquainted with the facts of the case.

The *object of verification* is to fix the responsibility for pleading on the person verifying it.

It is well settled that omission to comply with the requirements of rules provided for presentation of plaints, like absence of verification, does not affect jurisdiction of the court. (*Bhalu Naik* v. *Hemo Naikani*, A. I. R. 1969 Orissa 236 (S. J.) ; (1969) 35 Cut. L. T. 532).

In any *suit by or against the Government*, the plaint or written statement shall be verified by any person—

(a) whom the Government may, by general or special order, appoint in this behalf ; and
(b) who is acquainted with the facts of the case. (O. 27, R. 1).

In *suits by or against a corporation*, any pleading may be verified on behalf of the corporation by—

(a) the Secretary of the corporation ; or
(b) any Director of the corporation ; or
(c) other principal officer of the corporation who is able to depose to the facts of the case. (O. 29, R. 1).

It should be noted that this rule is only permissive. The corporation may, under general rule, authorise anybody else also to sign or verify a pleading on its behalf.

Where persons sue or are sued *as partners in the names of their firm*, it shall suffice if the pleading or other document is verified or certified by any of such persons. (O. 30, R. 1 (2)).

Alternative and Inconsistent Pleadings.—There is nothing in law to prevent a plaintiff from relying upon several different rights in the alternative or to prevent a defendant from raising as many distinct and separate defences as he likes. In other words, it can be said that a plaintiff may set up two or more material facts and claim reliefs thereunder in the alternative (e. g., a plaintiff may rely upon different titles alternatively, though they may be inconsistent) and similarly the defendant may raise as many distinct, separate and inconsistent defences as he may think proper. (*Bhutan Mohini* v. *Kumud Bala*, *1924* Cal. *467*). This is what is called "pleading in the alternative".

This is so because of Explanaeion IV to Section 11, Code of Civil Procedure which provides that if a matter which might and ought to have been made a ground of attack or defence is not so made, the raising of such ground of attack or defence in a subsequent suit will be deemed to be barred by the principle of constructive *res judicata*. The object is to put an end to litigation. It is, therefore, proper to take inconsistent pleas in the same pleading rather than thinking the risk of its being held as barred by *res judicata*.

It has, thus, been held that a plaintiff may claim proprietary right in a piece of land or in the alternative a right of easement. He may allege the adoption of the deceased holder of property or rely on a will from the last holder. Likewise, a defendant may plead in a suit on a bond that he did not execute it and in the alternative that the claim is barred by limitation. It is, however necessary that the facts on which each alternative claim or defence is founded should be distinctly and separately stated. If they are not clearly set out, the court wi ll not permit an attempt to show that any particular ground can be covered by implication from certain allegations.

In England, since the passing of the Judicature Acts, inconsistent claim and defences are freely made. Even denials of indebtedness and pleas of payment are freely permitted. The only qualification is that such an inconsistent plea causes no embarrassment to the opposite party. In India, there is no statutory rule on the point. In some cases, opinion was expressed that where alternative claims and defences can be supported by the same evidence they should be allowed. But this test of evidence is not a satisfactory test because alternative and inconsistent ground of attack or defence, must necessarily be supported by different evidence. If the evidence, on one ground, is destructive of another ground, the two grounds obviously cannot be combined in the same pleading. The general rule as laid down by Mogha in the "Law of Pleadings" is.—

"There can be no objection to preferring alternative and inconsistent claims or raising inconsistent pleas, provided they are based on facts which are not inconsistent. Even inconsistent facts are not prohibited as a matter of law, but inconsistent claims or inconsistent pleas which are based on facts which are so inconsistent that the evidence required to prove one fact is destructive of the other fact, should be discouraged, *except* when the facts are not within the per onal knowledge of the party pleading them."

In brief, the rule is—

(*i*) That inconsistent pleas and claims based on same facts are not prohibited ;

(*ii*) That inconsistent pleas and inconsistent claims based on inconsistent facts should be discouraged ;

(*iii*) except when the facts are not within the personal knowledge of the party pleading.

Thus, a mortgagor may allege that the mortgage money has been paid and may, in the alternative, offer to pay any portion that may still be found due. In an ejectment suit, the plaintiff may claim a decree on the ground that the defendant is his tenant or that he is a trespasser. Similarly, there may be a suit for a declaration that the plaintiff is owner under a sale deed or on the ground of adverse possession.

In 18 *All. 125*, there was a suit for a declaration that a bond was not executed by the plaintiff or that it was null and void for want of actual and valid consideration. The Allahabad High Court held that the plaintiff may set up two such inconsistent pleas though this circumstance might mitigate against his success in the suit.

A plea of payment may not, however, be joined to a plea that the bond is a forgery or that the defendant never borrowed the money. Similarly, a denial of contract and the plea that it was intended to be wager, should not be joined, but, if the defendant is the representative of the original party to the contract and has no personal knowledge of transaction, he may raise both the defences. For instance, a Hindu son may plead that his father did not borrow money or that he borrowed it for illegal purpose.

The defendant can say in his written statement that the bond in suit was not executed by him, or, in the alternative, that the bond is void for want of consideration. This is an alternative plea put forward by the defendant.

Illustrations.—(1) A party may be in a position to say,"I am entitled to succeed on two or more distinct grounds which are perfectly consistent with each other, so that, in proving one, I do not disprove the other." Here he can plead in the alternative.

(2) A plaintiff may say consistently enough, "I believe I am entitled to this relief and on this ground, but, even if the court decides that any proof falls short of my whole case, still I am entitled to some relief though my right may not be exactly what I think they are".

(3) A plaintiff may say, "I am not certain what the defendant's case will be, but I am ready to meet him on any ground he chooses."

(4) A litigant may put his case, in this way.—"With may present knowledge of the facts I cannot be sure which of the two views is the right one but I say that one or other of the two things happened, and, whichever it may turn out to be, I am entitled to judgment in my favour."

(5) A party may contradict himself in his pleading as much as he pleases so long as the facts on which every alternative is based are definitely stated. In some cases it has been allowed, *e. g.*,—

(*i*) tenancy and limitation ;

(*ii*) a contract, and if it is invalid or true, the original right ;

(*iii*) discharge of mortgage debt, or an offer to discharge it, in a suit for redemption ;

(*iv*) bond in suit a forgery, and if executed not binding. The defendant may raise inconsistent pleas.

Modes of having pleadings amended.—1. One mode for party requiring amendment of the pleadings of the other party is by way of an application under O. 6, R. 5.

2. Another mode of having the pleadings of the opposite party amended is by way of raising objections in the written statement or replication.

3. Under O. 6, R. 16 by an application.

4. Under O. 6, R. 17 by an application.

Kinds of amendment of pleadings.—Amendment may be—

(i) Compulsory ; or
(ii) Voluntary.

(i) **Compulsory Amendment.**—Amendment is said to be compulsory—

(a) when it is ordered by the Court *suo motu ; or*
(b) when it is allowed on application by the opposite party.

If the pleading is vague, defective or incomplete, the opposite party may apply for further particulars under rule 5, Order 6 or for having objectionable portion struck out or amended. If the pleading objected to is a plaint which does not disclose any cause of action, the defendant may apply to have it rejected under rule 11 (a), Order 7.

The Court has power to exercise any of these powers of its own motion even without the application by the opposite party.

(ii) **Voluntary amendment.**—Amendment is voluntary if it is sought by a party in his own pleading. The party whose pleading is defective or incomplete may amend it—

(1) by filing further particulars with the leave of the Court ; or
(2 by filing additional pleading ; or
(3) by amendment under rule 17 of Order VI.

(1) When a party who has in original pleading or in compliance with the order of court given all particulars, discovers new matter which he desires to add to particulars, he should obtain leave of the court to deliver further particulars. Such an application will be generally allowed where the addition of particulars will cause no injury to the opposite party except such as can be compensated by costs. It will not be allowed if it seeks to introduce a new cause of action.

(2) If the defendant makes certain new allegations in his written statement and the plaintiff wants to reply to them, he may obtain leave of the court to file written statement except when he wants to plead to defendants' claim for set-off which he can do as of right without seeking the permission of the Court. Likewise, if the defendant has omitted to raise some important fact in written statement, he can obtain leave of the Court to file additional written statement.

A party cannot be allowed to depart from his original pleading in subsequent pleading. Departure takes place when the pleader deserts his previous ground and resorts to another and different ground. No subsequent pleading should raise any new ground of claim or defence or contain any allegation of fact inconsistent with the previous pleading. The way to raise such new plea is by way of amendment under Order 6, rule 17 and not by filing additional pleading.

(3) **Amendment under O. 6, R. 17.**—Under Rule 17 of Order 6, C. P. C., there are the *following four kinds* of amendments :—

(1) *Amendment as to form.*—Such as arising due to want of signature, arising in description of names of property, etc.

(2) *Amendment as to substance.*

(3) *Amendment as to relief.*—If, on the facts alleged in the plaint, a plaintiff can seek several reliefs together or in the alternative and he has sought only one of them, he can amend the plaint by adding a prayer for the others at any stage of the suit. But such amendment is not allowed if—

(a) it would change the character of the suit ; or

(b) it is sought at a very late stage ; or

(c) it is unfair to the other party.

(4) Amendment as to *parties* to a suit.

Power of court to strike out pleadings.—The court may, at any stage of the proceedings, order—

(a) to be struck out ; or

(b) amended,

any matter in any pleading which may—

(a) be unnecessary ; or

(b) be scandalous ; or

(c) tend to prejudice, embarrass or delay the fair trial of the suit. (O. 6, R. 16).

The court has been given a wide discretion to amend the pleadings at any stage if it thinks that it is necessary to do so to secure the ends of justice. (*See* O. 6, Rules 16 and 17).

Thus an application for striking out or *amending opponent's pleading* under this rule may be made at any stage. The Court has a discretion to allow such application if it thinks that—

(i) the matter objected to is irrelevant for the decision of the case ; or

(ii) it is scandalous ; or

(iii) it is unduly embarrassing.

Scandalous statements are ordered to be removed as such statements being part of the record may do great injury if they are not removed. But, however grave an imputation may be, it will not be struck out if it is relevant to any issue in the case.

A pleading is *embarrassing* if it is unintelligible, ambiguous or bad for multifariousness.

It is for the pleader to determine whether any really useful purpose will be served by making the application. If he thinks it is worthwhile to make such an application, he should do so under rule 16. Where a plaint was verbose, extremely loose and unintelligible and did not give particulars of the contract, breach of which was alleged, nor of the special damages claimed nor any dates, it was held that the plaint ought to have been struck out under rule 16 or an order for its amendment should have been made so that an intelligible case could have been presented and the defendant put in a position to know what case he had to meet.

Variance between pleadings and proof.—The general rule is that a plaintiff is bound by his pleading and should not be allowed—

(i) to contradict the facts stated therein, or

(ii) to succeed on a case not made out in his plaint.

The reason of the rule is enunciated in the maxim "*secundum allegeta at probata*", *viz.*, a plaintiff can succeed only according to what was alleged and proved. The other party will be seriously prejudiced if the plaintiff were allowed to substantiate a case different from that pleaded.

Acting on this principle, it has been held that a plaintiff claiming by survivorship cannot, at a late stage, claim as heir. So also a plaintiff claiming on the basis of proprietary title, may not rely upon possessory title if he has failed to prove the former. But in *1923 Nag. 273*, it was held that a plaintiff who fails to prove all the facts alleged by him, may yet obtain the whole or any part of the relief if the facts pleaded by the defendant and found by the court show him to be entitled thereto. In *1942 Nagpur 12*, the plaintiff sued upon a bond and pleaded cash consideration and the defendant admitted execution but denied cash consideration. The court found no cash consideration. It was *held* that the relief could be given on the basis of admission of execution by defendant.

As said above, the reason for the general rule is that a party would be seriously prejudiced if his opponent were to substantiate a case different from that pleaded. Therefore, where—

(a) a party is not prejudiced ;

(b) he is not taken by surprise ;

(c) from the pleadings themselves, the party knew what was the point in issue ; and

(d) justice is better done by deciding the case on merits as presented by the parties ;

the technical rule mentioned above is not enforced.

It follows that every variance between pleading and proof is not necessarily fatal, and slight variance should not be regarded as such.

If A sues B for rent on the basis of lease deed and it is found that for some reason the lease deed is not admissible in evidence, decree can be given for damages on the basis of use and occupation by the defendant in a suit for ejectment of defendant alleged to be tenant if the tenancy is not proved but it is found that the plaintiff is the owner and the defendant has been in occupation under permission of the plaintiff or his predecessor, then, according to Allahabad, Nagpur, and Patna High Courts, plaintiff can get a decree but, according to Calcutta and Madras High Courts, he cannot.

The better procedure is that the judge should insist upon an amendment of the pleading and if necessary should direct further issues to be raised and further opportunity to be given to the other party to meet the altered case.

Though every variance between pleadings and proof is not fatal and slight variance is permissible, yet parties are not authorised to bid *adieu* to their pleadings and plead a new case. The Court should not set up an entirely new case which was never presented by the parties by their pleadings. The decision of the court should be based on the case to be found in the pleadings or a case which is consistent therewith. The Court cannot set up a case which was never intended by the pleadings and which is at great variance and inconsistent with the case pleaded. For example, a plaintiff suing for joint possession on the ground that his cattle grazed on the land cannot be given a decree for grazing right when the title is not proved.

In a suit for customary right to take out procession with music, etc., if the plaintiff fails to prove customary right, decree cannot be given on the basis of common law right. Where estoppel is pleaded on the basis of a particular compromise, the court cannot find estoppel on the basis of another compromise. Similarly, where the plaintiff claims some right by virtue of a particular custom, he cannot be allowed to set up another custom at the time of the trial.

The rule of *secundum allegata at probata*, however, applies only to pleas of fact and not to pleas of pure law which may be taken at any stage. In *A. I. R. 1944 Mad. 530* it was held that if facts found by the Court give rise to a situation where certain consequences follow in law, Court must give effect to those consequences though not pleaded or wrongly pleaded by the parties. In this case, the plaintiff had put in the plaint all the facts on which he based his claim without deducing his legal position properly from these facts and thus based his suit on a wrong cause of action. It was *held* that it was for the Court to apply the correct legal principles and give the plaintiff the due relief. In another case, where the Court considered a transaction to be illegal, it refused to give relief on it even though illegality was not pleaded by the parties (*vide* 1940 Mad. 547).

Amendment of Pleadings.—Order 6, Rule 17 of the Code of Civil Procedure provides that—

(a) the court may, at any stage of the proceedings, allow either party to alter or amend his pleadings in such manner and on such terms as may be just ; and

(b) all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

Rule 17 deals with *amendment of his own pleadings* by a party.

Thus, the Court is given a very wide discretion under this rule. Of course, the discretion is to be exercised judicially and is subject to correction by the superior court.

In *Cropper* v. *Smith*, 86 Ch. D. 700, Bowen, L. J. observed : "there is no kind of error or mistake which, if not fraudulent or intended to overreach, ought not to be corrected if it can be done without injustice to the other party." And there is no injustice if the other side can be compensated by costs. It follows that leave to amend should be granted very freely. Grant of amendment should be the rule and refusal an exception. The main consideration in exercising this discretion is that rules or procedure are made to facilitate justice. The court should see that—

(i) multiplicity of suits is avoided ; and
(ii) real matters in controversy between the parties are clearly brought out.

The general principles on which this discretion is to be exercised are :—

(1) The court should not allow a party to raise a new case.

(2) It should not permit an amendment by which a legal right acquired by the other party is taken away.

(3) The Court should strive to allow amendment in all cases where the opposite party can be compensated by costs.

Amendment should thus be allowed to overcome the effect of *bona fide* mistakes, whether of fact or of law. It does not matter whether the original omission arose from negligence or carelessness.

One of the purposes and objects of allowing amendment of the plaint is to avoid multiplicity of suits, and the Court has accordingly full power to allow amendment, the question whether or not to allow it in a given case being a matter of discretion, *albeit*, judicial discretion. (*Laxmi Narain Oil Mills* v. *Mamraj Musadilal*, A. I. R. 1869 Delhi 311 (S. J.)). The consideration which broadly weighs with the Court is whether—

(a) amendment can be allowed without working injustice to the other side ; and

(b) award of costs can compensate the opposite party for the position of inconvenience or disadvantage in which the amendment would place him.

The discretion is that of the Court allowing amendment, and the Court on revision cannot ordinarily substitute its own discretion for that of the Court below dealing with the prayer for amendment. (*ibid*). In this case, on jurisdictional or similar infirmity with the impugned order allowing amendment of the plaint having been pointed out and the Court below having kept in view the recognised principle while dealing with the question, the order of the court below was not interfered with on revision by that High Court.

The aim should be to advance substantial justice. Therefore, if, in keeping with justice to the other side, an amendment can be allowed, then it should be allowed.

The Court can allow an amendment, though it has no jurisdiction to try the suit. (*Kundan Lal* v. *Sri Narain Lal*, A. I. R. 1958 All, 96 (D. B.). In this case the suit was for the possession of a house. The defendant took possession of it and, after demolishing it constructed a new house in its place but this fact was not mentioned in the plaint and the relief claimed was just for possession of the plaintiff's house. The plaintiff applied for amendment of the plaint in order to make it clear that he sought possession over his old house and not over the new house. The defendant pleaded that the value of the new house constructed by him was more than Rs. 5000/- that consequently the suit was not within the jurisdiction of the trial court and that it had no jurisdiction to pass any order including one allowing the amendment. It was held that, through the amendment, the plaintiff had only clarified what he meant in the plaint and did not want any reduction in the subject matter covered by the plaint. When the plaintiff wanted only to explain what he meant in the plaint there does not arise any question of jurisdiction to allow the amendment. Hence, there is nothing to bar the amendment. (*ibid*).

All amendments ought to be allowed which satisfy the following two conditions :—

(a) not working in justice to the other side ; and

(b) being necessary for the purpose of determining the real questions in controversy between the parties. (*Pirgonda Hongonda Patil* v. *Kalgonda Shidgonda Patil*, A. I. R. 1957 S. C. 363 : 1957 S. C. R. 595 .

Suit No. 12 of 1957 was stayed under Section 10 of the Code of Civil Procedure by the Civil Judge during the pendency of First Appeal No. 207 of 1957 in the High Court inasmuch as the matter in issue in the present suit No. 12 was also directly and substantially in issue between the parties in the First Appeal. The Civil Judge thereafter allowed the plaintiff's application for amendment of the plaint by impleading one Akhtar as defendant No. 2 in the suit, repelled the contention that the Civil Judge had no jurisdiction to entertain an application for amendment by impleading defendant No. 2 as a party to the suit as the trial of the same had been stayed under Section 10 C, P. C., and allowed the amendment. It has to be *held* that—

(i) The object uuderlying the provisions of Section 10 of Civil Procedure Code is to prevent simultaneous trial of two suits in which the

matter in issue between the parties is directly and substantially the same.

(ii) (a) An interlocutory order in the nature of—

1. issue of injunction, or

2. appointment of a receiver ; or

(b) an order of attachment before judgment, cannot be regarded as a matter affecting the trial of the suit.

(iii) The question as to whether a party should or should not be impleaded, does not encroach on the merits of the controversy between the parties. It is a matter of a formal nature and cannot in any way determine thir respective rights.

(iv) Therefore, an *amendment* of the plaint *by adding a party* defendant to the suit is not a matter relating to the trial of the suit and such order cannot be taken to be a step in the trial of the suit.

(v) The Civil Judge was well within his jurisdiction to allow the *amendment imp'eading a party* to the suit.

It is always open to a court to take into account the facts which come into existence after the filing of a suit and, if necessary, to petmit amendment of the plaint in the light of the changed circumstances. If an amendment of the plaint *avoids multiplicity of litigation without changing the essential character of the suit* itself, the amendment should be allowed. Therefore, where, in a suit for accounts brought by a partner, the partnership having come to an end after the institution of the suit, the plaintiff prays for the *amendment of the plaint by adding a prayer* for dissolution of the partnership, the amendment should be allowed. (*Har Prasad* v. *Lala Sita Ram*, A. I. R. 1958 All. 36).

A glance at the reported cases will show that a *suit for declaratian* has been allowed to be amended into a suit for consequential relief. A *suit for injunction* may be converted into a suit for possession. Similarly a *suit based on a promissory note* was allowed to be converted into a suit based on original consideration. On the other hand, a plea of fraud on one specific ground was not allowed to be changed into fraud on another ground.

The object of Order 6, Rule 17, is that the courts should get at and try the merits of the cases which come up before them and should consequently allow all amendments which may be necessary for the purpose of determining the real question in controversy between the parties provided that it can be done without causing injustice to the other side.

The settled rule, with regard to amendment of pleadings, is that a party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid multiplicity of suit, *provided that*—

(a) there has been no undue delay ;

(b) no new or inconsistent cause of action is introduced ;

(c) no vested interest or accrued legal right is affected ;

(d) the application is not mala flde ; and

(e) no injustice is done to the other side. [Vide *Tika Sao* v. *Hari Lal*, A. I. R. 1941 Pat. 276 : *Panchaksharam Pillai* v. *Rangaswami Pillai*, A. I. R. 1948 Mad. 332=(1948) I. M. L. J. 337 : *Ahmed Hossein* v. *Mt. Chembelli*, A. I. R. 1951 Cal. 262=85 Cal. L. J. 213; *Kailash Singh* v. *Sheopujan Singh*, A. I. R. 1952 Pat. 380; *Goverdhan Bang* v. *Government of the Union of India*, A. I. R. 1953

Hyd. 212=I. L. R. (1953) Hyd. 366 ; *Amolakchand Mohanlal* v. *Firm of Sadhuram Tularam*, A. I. R. 1954 Nag. 200=1954 Nag. L.J. 101 ; *Chaltanatha Karayalar* v. *Central Bank of India Ltd. Alleppey*, A. I. R. 1955 Trav. Co. 201=I. L. R, (1955) Trav. Co. 411 ; *Maruti* v. *Ranganath*, A. I. R. 1955 Hyd. 1 (F. B.)=I. L. R. (1954) Hyd. 575 ; *M. B. Sirkar and sons* v. *Powell & Co.*, A. I. R. 1956 Cal. 630=60 C. W. N. 840 ; *Mahamood* v. *Ayissu*, A. I. R. 1957 Ker. 140=1957 Ker. L. T. 511 ; *Har Prasad* v. *Lala Sita Ram*, A. I. R. 1958 All. 36 ; *Jaldu Anantha Raghurama Arya* v. *Jaldu Bapanna Rao*, A. I. R. 1959 A. P. 448=(1959) 1 Andh. W. R. 239 ; *Pangoti Mangarao* v. *Chinnadi Kishan Rao*, A. I. R. 1965 A. P. 98=I. L. R. (1963) Andh. Pra. 931 ; *Nichhalbhai Vallabhai* v. *Jaswantlal Zinabhai*, A. I. R. 1966 S C. 997=(1966) S. C. W. R. 199].

It is also evident that the amendment of pleading is in the discretion of the Court, though Order 6, Rule 17 confers a very wide discretion on the Courts. The powers are to be liberally exercised. But the discretion must be exercised according to judicial principles and not in an arbitrary, vague or fanciful manner so as to cause injustice to the other side. The main considerations to be borne in mind in exercising the discretion are that—

(a) the rules of procedure have no other aim than to facilitate the task of administering justice ;

(b) multiplicity of suits should be avoided ; and

(c) the interests of substantial justice should be advanced even if a fresh suit on the amended claim is barred by limitation.

An amendment merely clarifying the position put forward in the plaint or a written statement can be allowed. (Vide *L. J. Leach and Co. Ltd* v. *Jardine Skinner and Co.* A. I. R. 1957 S. C. 357=1957 S. C. R. 438 : *Pirgonda Hongonda Patil* v. *Kalgonda Shidgonda Patil*, A. I. R., 1957 S. C. 363=1957 S. C. R. 595 ; *Firm Ghulam Mohiuddin* v. *State of Jammu and Kashmir*, A. I. R. 1961 J. & K. 6 ; *Nangsitombi Devi* v. *S. Nimai Sarma*, A. I. R. 1965 Mani. 53; *C. Subba Rao* v. *K. Brahmananda Reddi*, A. I. R. 1967 A. P. 155=1967 Cr. L. J. 691 ; *Mahabir Prasad Singh* v. *Narmdeshwar Prasad Singh*, A. I. R, 1967 Pat. 326 ; *A. K. Gupta & sons Ltd.* v. *Damodar Valley Corporation*, A. I. R. 1967 S. C. 96=(1966) 1 S C. R. 796 ; *Ballardie Thompson & Mathews* v. *Kshetrimayum Tomba Singh*, Civil Revision case No. 22 of 1966, decided by C. Jagannadhacharyula J. C.=1967 Manipur L. J. 371).

It is also equally well settled that the falsity of the case in the amendment cannot be considered at this stage without allowing the amendment and framing an issue thereon and allowing both sides to adduce evidence. (Vide *Krishna Rao* v. *Gangadeswarar Temple*, A. I. R. 1949 Mad. 433 : (1949) 1 M. L. J, 64 *Dharmalinga Chetti* v. *A. M. Krishnaswami Chetty*, A. I. R. 1949 Mad. 467=(1948) 2 M. L. J. 644 ; *Abdul Rahim* v. *Abdul Jabbar*, A. I. R. 1950 Cal. 379=54 C W. N. 445 ; A. I. R. 1953 Hyd. 212=I. L. R. (1953) Hyd. 366 ; *Damodara Sastry* v. *Sanjiviah*, A. I. R. 1955 Mys. 141=I. L. R. (1955) Mys. 422).

The plaintiff filed a suit on 8-6-1960 for recovery of certain sum of money. The plaintiff's claim arose out of a contract in writing dated 5-1-1956 whereby the defendant sold and or delivered to the plaintiff certain quantities of steel rails at rates mentioned in the plaint and delivery was immediate. The plaintiff alleged in the plaint that the defendant was unable to effect delivery in terms of the contract and that, pursuant to the

request of the defendant, the time for delivery was extended. Subsequently on 29-7-65, th plaintiff made an application for amendment of the plaint. In this application the plaintiff alleged in para 21 that the defendant, by a letter dated 24-7-1957 written and signed by the defendant and/or its agents duly authorised in that behalf, duly acknowledged its liability to deliver the balance quantity of the goods under the contract and also acknowledge that the time for delivery and/or performance had not expired. The plaintiff further alleged that the plaint should be amended in the manner as indicated in red ink in the copy of the plaint annexed thereto and that the proposed amendments were by way of elucidation of the allegations and further that, by mistake and/or through inadvertence, the plaintiff-petitioner failed to incorporate the elucidation and/or particulars in the original plaint. In the proposed amendment, the plaintiff alleged that the time for delivery was extended till a reasonable time after 24-7-57, which was a period of 3 weeks from 24th July, that is to say, 16th August, 1957 in the facts and circumstances of the case. The other proposed amendments sought for were in paragraphs 9, 12 and 20 of the plaint. The letter, dated 24-7-57, was not annexed to the application for amendment and even when the defendant defined the existence of that letter no copy of the letter was annexed to the affidavit, and the original was not produced at the hearing of the application. It has to be held that—

(a) The application for amendment is not a matter of right but the applicant has to allege facts.

(b) The proposed amendment with regard to the acknowledgement of liability by the alleged letter suffers not only from the vice of mala fide but also from the infirmity of suppressing the same from the court. The plaintiff failed to establish the claim for amendment based on the letter, and this proposed amendment is liable to be disallowed.

(e) The proposed amendments with regard to paragraphs 9, 12 and 20 cannot be said to be a new case or an inconsistent case for the obvious reason that these proposed amendments are really amplification of the case of extension already pleaded, and, therefore, they should be allowed.

Where a party to a litigation, being unaware of the existing state of facts, makes the averment—

(a) which he then seeks to rectify so as to make it in accordance with the circumstances truly prevailing between the parties and

(b) which circumstances may be related to the real questions in controversy between them,

such an amendment may be said to have been sought with neglect but it cannot be held that the amendment is outside the scope of Order 6, Rule 17. (*M/S Rising Sun Press, Delhi* v. *Sri Ram Narain*, A. I. R, 1973 Delhi 167).

Problem.—Manohar Lal, son of Jai Jai Ram, commenced an action in the court for a decere for Rs. 10,000/- being the value of timber supplied to the defendant (the National Building Material Supply). The action was instituted in the name of "Jai Jai Ram Manohar Lal" which was the name in which the business was carried on. The plaintiff Manohar Lal subscribed his signature at the foot of the plaint as "Jai Jai Ram Manohar Lal by the pen of Manohar Lal", and the plaint was also similarly verified.

The defendant, by its Written Statement, contended that the plaintiff was an unregistered firm and, on that account, incompeten tto sue.

The plaintiff subsequently applied for leave to amend the plaint. He stated that—

(i) The business name of the plaintiff is Jai Jai Ram Manohar Lal.

(ii) In the plaint, Manohar Lal the owner and proprietor is clearly shown and named.

(iii) It is a joint Hindu family business and the defendant and all knew it that Manohar Lal whose name is there along with the father's name, is the proprietor of it. The name is not an assumed or fictitious one.

The plaintiff, on these averments. applied for leave to describe himself in the cause title as "Manohar Lal, proprietor of Jai Jai Ram Manohar Lal" and, in para 1 of the plaint, to state that he carried on the business in timber in the name of Jai Jai Ram Manohar Lal.

The question is whether leave to amend the plaint should or should not be granted by the court.

Solution.—Rules of procedure are intended to be a handmaid to the administration of justice. A party cannot be refused just relief merely because of

(a) some mistake, negligence or inadvertence ; or

(b) even infraction of the rules of procedure.

The court always gives leave to amend the pleading of a party, unless it is satisfied that—

(a) the party applying was acting mala fide, or

(b) by his blunder, he had caused injury to his opponent which may not be compensated for by an order of costs.

However—

(a) negligent or careless may have been the first omission, and

(b) late the proposed amendment,

the amendment may be allowed if it can be made without injustice to the other side.

In *Amolakchand Mewaram v. Babulal Kanalal*, A.I.R. 1933 Bom. 304 : 35 Bom. L. R. 569, Beaumont, C. J., in delivering the judgment of the Bombay High Court, set out the principles applicable to cases like the present and observed :

".....the question whether there should be an amendment or not, really turns upon whether—

(i) the name in which the suit is brought, is the name of a non-existent person, or

(ii) it is merely a misdescription of existing persons.

If the former is the case, the suit is a nulity and no amendment can care it.

If the latter is the case, *prime facie* there ought to be an amendment because the general rule, subject, no doubt, to certain exceptions, is that the court should always allow an amendment where any loss to the opposing party can be compensated for by costs."

In this Bombay case, a Hindu undivided family sued in its business name. It was not appreciated at an early stage of the suit that, in fact, the firm name was not of a partnership, but was the name of a joint Hindu Family. An objection was raised by the defendant that the suit as filed was not maintainable. An application to amend the plaint, by substituting the names of the three members of the joint family for the name of the family firm as plaintiffs, was rejected by the Court of first instance. In appeal, the High Court observed that a suit brought in the name of a firm in a case not within Order 30, Civil Procedure Code being, in fact, a case of misdescription of existing persons, leave to amend ought to have been given.

The Supreme Court considered a somewhat similar case in *Purshottam Umedbhai & Co. v. Manilal & Sons*, A. I. R. 1961 S. C. 325 : (1961) 1 S. C. R. 92 : (1961) 1 S. C. J. 283 : (1961) 1 S. C. A. 293 : (1961) 1 Ker. L. S. 164 : (1961) 1 Andh. W. R. (S. C.) 38 : (1961) 1 M. L. J. 38, where a firm, carrying on business outside India, filed a suit in the firm name in the High Court for a decree for compensation for breach of contract. The plaintiff then applied for amendment of the plaint by describing the names of all the partners and striking out the name of the firm as a mere misdescription. The application for amendment was rejected on the view that the original plaint was no plaint in law and it was not a case of misnomer or misdescription, but a case of a non-existent firm or a non-existent person suing. In appeal, the High Court held that the description of the plaintiff by a firm name in a case where the Code of Civil Procedure did not permit a suit to be brought in the firm name should properly be considered a case of description of the individual partners of the business and, as such, a misdescription which, in law, can be corrected and should not be considered to amount to a description of a non-existent person. Against the order of the High Court, an appeal was preferred to the Supreme Court. The Supreme Court observed :

"Since, however a firm is not a legal entity, the privilege of suing in the name of a firm is permissible only to those persons who, as partners, are doing business in India.

Since privilege is not extended to persons who are doing business as partners outside India. In their case, they still have to sue in their individual names.

If, however, under some misapprehension, persons doing business as partners outside India do file a plaint in the name of their firm, they are misdescribing themselves, as the suit instituted is by them, they being known collectively as a firm.

It seems, therefore, that a plaint filed in a Court in India in the name of a firm doing business outside India is not by itself a nullity. It is a plaint by all the partners of the firm with a defective description of themselves for the purpose of the Code of Civil Procedure.

In these circumstances, a Civil Court can permit, under the provisions of section 153 of the Code (or possibly under Order VI, Rule 17, about which we say nothing), an amendment of the plaint to enable a proper description of

the plaintiffs to appear in it in order to assist the Court in determining the real question or issue between the parties".

These cases do no more than illustrate the well-settled rule that all amendments should be permitted as may be necessary for the purpose of determining the real question in controversy between the parties, unless, by permitting the amendment, injustice may result to the other side.

In the present case, the plaintiff was carrying on business as commission agent in the name of "Jai Jai Ram Manohar Lal". The plaintiff was competent to sue in his own name as Manager of the Hindu undivided family to which the business belonged. He says that he sued on behalf of the family in the business name. The contention that the application for amendment of the plaint cannot be granted because there was no averment therein that the misdescription was on account of a bona fide mistake and on that account the suit must fail, cannot be accepted. In my view, there is no rule that, unless, in an application for amendment of the plaint, it is expressly averred that the error, omission or misdescription is due to a bona fide mistake, the Court has no power to grant leave to amend the plaint. The power to grant amendment of the pleadings is intended to serve the ends of justice and is not governed by any such narrow or technical limitations.

Since the name in which the action was instituted, was merely a misdescription of the original plaintiff, no question of limitation arises, and the plaint must be deemed, on amendment, to have been instituted in the name of the real plaintiff on the date on which it was originally instituted.

In my view, the application for amendment has to be allowed and the order granting the amendment of the plaint has to be passed by the Court.

Amendments should be refused only where the other party cannot be placed in the same position as if pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs. (*Pirgonda Hongonda Patil* v. *Kalgonda Chidgonda Patil*, A. I. R. 1957 S. C. 363 : 1957 S. C. R. 595).

Where the amendment sought is not necessary for the determination of the real question in controversy between the parties but it is for securing an *additional relief* if the plaintiff succeeds in establishing the relief already prayed for, it cannot be allowed. *Deep Chand* v. *Sukhlal*, A. I. R. 1969 M. P. 232 (D. B.) : 1969 M. P. L. J. 434 : 1969 M. P. W. R. 476: 1969 Jab. L. J. 541)

Amendment should be refused where it is unnecessary for the purpose of determining the real question of controversy between the parties. This is so when the amendment sought is purely technical or of no substance. For instance, if after the close of the plaintiff's case the defendant pleads under section 47 that the suit is barred, the amendment may be refused.

Amendment is also refused where it would cause such injury to the opposite party as cannot be compensated by costs.

In *Nrising Prasad Paul* v. *Steel Products Ltd*,. A. I. R. 1953 Cal. 15 : 89 Cal. L. J. 140, the learned Judge of the High Court was dealing with an application for amendment apparently on the original side dealing with the suit, and, in

the concluding part of his order he observed that he was not satisfied at all either on the merits or the bona fides of the application and so the application was dismissed. Incidentally, the explanation for the delay in seeking amendment was described to be a mere excuse.

In *Kesho Ram Passey* v. *Dr. P. C. Tandon*, A. I. R. 1952 Punj. 221 : 54 Punj. L. R. 66, in a suit for enjectment on the ground that the tenant had sublet the premises to another person, an appeal was preferred and the case was remanded. The plaintiff then sought to amend the plaint by adding two more causes of action to the effect that the defendants had made structural alterations to the premises presumably after the suit had been filed. This amendment was disallowed, being intended to introduce a new cause of action. On revision, the High Court declined to interfere and observed that the defendant, in order to meet the new ground, would have to adduce evidence on different points altogether which did not exist at the time when the suit was instituted and this would unfairly prejudice him.

The principles which can be gathered from the rulings, as to when the leave to amend should be refused, can be summed up succinctly as follows :—

(1) where the amendment is not necessary for the purpose of determining the real questions in controversy between the parties, as where it is—

(a) merely technical ; or

(b) useless and of no substance.

(2) Where the suit of the plaintiff would be wholly displaced by the proposed amendment.

(3) Where the effect of the amendment would be to take away from the defendant a legal right which has accrued to him by lapse of time.

(4) Where the amendment would introduce a totally different, new and inconsistent case, and the application is made at a late stage of the proceedings.

(5) Where the application for amendment is not made in good faith.

Problems 1. The plaintiff filed the suit for partition and possession of one third share of the property left by one Mst. R. No prayer for past mesne profits or future mesne profits was, however, made. In the Relief clause, a general relief was claimed to the effect that any other relief or reliefs which the Court may hold the plaintiff to be entitled to, be decreed. Thereafter the plaintiff made an application for amendment of the relief clause in the plaint to the following effect :—

"That any such other relief or reliefs which this Hon'ble Court may hold the plaintiff to be entitled to be decreed to him *including profits or mesne profits by directing an enquiry under Order 20, Rule 12*, C. P. C".

This application was opposed by the defendant on the ground that a large part of the future mesne profits had already been barred by limitation. Therefore, the amendment should not be allowed at that stage.

The question for determination is whether the amendment as prayed for should be allowed or refused.

Solution.—*In Leach & Co. Ltd.* v. *Jardine Skinner & Co.*, A. I. R. 1957 S. C. 357 = 1957 S. C. R. 438, the Supreme Court held :

"It is, no doubt, true that Courts would, as a rule, decline to allow amendments if a fresh suit on the amended claim would be barred by limitation on the date of the application.

But that is a factor to be taken into account in exercise of the discretion as to whether amendment should be ordered, and does not affect the power of the Court to order it if that is required in the interests of justice." (*See also M/S Kanmani Films by proprietor Essa Esmail* v. *G. K. Kutty*, A. I. R. 1969 Mys. 259 (S. J.) : (1969) 1 M/s, L. J. 99).

In this Supreme Court case, the suit was for damages on the footing of conversion. The Court came to the conclusion that the suit must fail on that basis. Thereafter, amendment was sought for asking for damages for non-delivery. The Supreme Court *held* that—

(a) The prayer in the plaint claimed damages, and all allegations which were necessary for sustaining the claim for damages were in the plaint ; and

(b) Clause 14 of the contract on which the claim for damages was founded, cannot be said to be foreign to the scope of the suit;

c) The amendment is allowed.

But it may be emphasised that, in the instant case, the amendment sought is not necessary for the determination of the real question in controversy between the parties. It is for securing an additional relief if the plaintiff succeeds in establishing the relief already prayed for.

A suit for mesne profits arising subsequent to the filing of the suit can be filed even during the pendency of the suit for possession and partition. The non-inclusion of the relief is not barred by Order 2, Rule 2, Civil Procedure Code. Under the circumstances, when the plaintiff had deliberately not claimed future mesne profits when the suit was originally filed, there is no justifiction for allowing the amendment after a substantial portion of the claim has been barred by limitation.

It is, no doubt, true that, under Order 20, Rule 12, Civil Procedure Code, where a suit is for recovery of possession of immovable property and for rent or mesne profits, the Court has a discretion to pass a decree directing an enquiry as to rent or mesne profits from the institution of the suit till—

(i) the delivery of possession to the decree-holder ; or
(ii) the expiration of 3 years from the date of the decree,

whichever event first occurs.

In *Mohammad Amin* v. *Vakil Ahmad*, A. I. R. 1952 S. C. 358 : 1952 S. C. R. 1133, mesne profits were not specifically claimed. Prayer for awarding "possession and occupation of the property together with all the rights appertaining thereto" was made. It was *held* by the Supreme Court that such a prayer did not include a claim for mesne profits and the grant of mesne profits by the courts below was held to be improper.

In Gopalakrishna Pillai v. *Meenakshi Aval*, A. I. R. 1967 S. C. 155 : 1966 S. C. R. (Supp.) 128 : (1967) 1 S. C. J. 450 : (1967) 1 S. C. A. 46 : (1967) 1 S. C. W. R. 1 : 1967 A. L. J. 239 : 1967 B. L, J. R. 222 : (1967) 1 Andh.

W. R. (S. C.) 89 : (1967) 1 Mad. L, J. 8) : (1967) A. W. R. 344, the Supreme Court, while discussing the provisions of Order 20, rule 12 and Order 7, rules 1, 2 and 7, held :

"In view of Order 7, rules 1, 2 and 7 of the Civil Procedure Code and Section 7 (1) of the Court Fees Act, a plaintiff must—

(a) plead his cause of action ;

(b) specifically claim a decree for *past mesne profits*,

(c) v lue the claim approximately ; and

(d) pay court fees thereon.

With regard to *future mesne profits*, the plaintiff has no cause of action on the date of institution of the suit and it is not possible for him to plead this cause of action or to value it or to pay court fees thereon at the time of the institution of the suit.

Moreover, he can obtain relief in respect of this future cause of action only in a suit in which the provisions of Order 20, Rule 12 apply. But in a suit to which the provisions of order 20, rule 12, apply, the court has discretionary power to pass a decree directing an enquiry into future mesne profits and the court may grant a general relief though it is not specifically asked for in the plaint."

In this Supreme Court case, while explaining the previous Supreme Court case (*A. I. R. 1952 S. C. 358*) it was observed that—

(a) The obs rvations in *Mohammad Amin's case* (A. I. R. 1952 S. C. 358) are applicable where the plaintiff claims only declaration of title and recovery of possession of immovable property and makes no demand or claim for either past or future mesne profits or rent ; and

(b) in such a case, the Court cannot pass a decree for future mesne profits under Order 20, rule 12.

(c) But where the suit is for recovery of possession of immovable property and for past mesne profits, the court has ample power to pass a decree directing an enquiry as to future mesne profits, though there is no specific prayer fo the same in the plaint.

From these two Supreme Court decisions it is clear that where, in a suit for possession past mesne profits are claimed, the court has ample power to grant future mesne profits also, but, where the party has failed to claim past mesne profits and the suit is o ly confined to the relief of declaration of title and possession of the property or partition, no relief can be given to the plaintiff under Order 20. Rule 12, C. P. C.

Therefore, in the present case at hand no past mesne profits were claimed and the suit was only confined to a claim for partition and possession and, therefore, the amendment sought is not a formal amendment for a relief which the plaintiff is entitled to under the provisions of O. 20, r. 12. By allowing the amendment of including the relief of future mesne profits, the other side will be denied of the valuable plea of limitation which has accrued to it.

As a result, the application for amendment is liable to be rejected.

2. The plaintiff G. filed a *suit for recovery of a sum* of Rs. 16,500/- against the defendant K. The cause of action for the claim was bassed on an

alleged agreement according to which the plaintiff was constituted as the sole distributor in the city for the distribution of certain motion picture. This picture was said to have been produced by the defendant. It is further the case of the plaintiff that the defendant was trying to transfer the right of distribution to other concerns and manoeurvring to take away the print of the picture from the custody and possession of the plaintiff. In regard to the assessment of the claim, it was contended by the plaintiff that, according to the agreement with the defendant, he should be paid 15% as commission on the total collections realised by the screening of the picture in question at a certain theatre in the city. The plaintiff had asserted that he was entitled to a lien on the print of the picture until his claim regarding the commission was fully satisfied. But he had not claimed any relief specifically in that regard.

The defendant denied the assertion of the plaintiff that he was constituted as the sole distributor of the picture as claimed by the plaintiff.

The plaintiff subsequent to the filing of the suit entered into an agreement with certain exhibitors and arranged for the screening of the picture at the city.

The plaintiff filed an interlocutory application asking for the relief of a temporary injunction or, alternatively, a prohibitory notice directing the defendant not to change his distributorship and not to disturb him from the possession of the print until the claim in the suit was fully satisfied. The said injunction was refused from which an appeal was preferred. In the course of the disposal of this application and the appeal, certain observations came to be made relating to his omission to seek the relief of declaration that he was a distributor and, in that capacity, was entitled to be in possession of the print of the picture.

Having failed in these collateral proceedings and possibly taking the clue from the observations of the courts therein relating to the temporary injunction, the plaintiff came forward with an *application under Order 6, Rule 17 seeking for the reliefs of declaration and permanent injunction* in regard to his right as a sole distributor of the picture for the area.

The application for the amendment of the plaint has to be allowed. *It must be held that*—

(a) It is true that at first sight, the reliefs sought for by way of amendment appear to be inconsistent with the original claim for money. But, on an examination of the facts and circumstances narrated in the plaint by way of setting forth the cause of action to the suit it is clear that the plaintiff has based his suit on a claim that he was the sole distributor for the motion picture. In so far as the quantum of commission claimed in the first instance, he seems to base it on a specific agreement relating to the screening of the picture. It, therefore, follows that the plaintiff will have to make out his case that he was under a contract appointed as a sole distributor for the area in question. It is exactly this claim that has been traversed by the defendant, denying the existence of any contract in that regard. In other words, the plaintiff has to establish that he was a sole distributor as claimed by him. It will, therefore, follow that it is open to him to claim a declaration in regard to his right of distributorship on the same set of facts as alleged in the plaint. To put it in a slightly different way, both the reliefs relating to

the money and the declaration of his right to his distributorshi p flow from the same set of facts and circumstances. Once this conclusion is reached, the mere fact that the two reliefs claimed are inconsistent with each other would not be sufficient to reject the prayer for amendment.

(b) As a rule, all the reliefs flowing from a certain set of facts and circumstances should be claimed by a suitor unless there are some specific reasons for not adopting that course. No doubt, having regard to—

(i) the background of the collateral and incidental proceedings, and

(ii) the specific reservation made by the plaintiff as to the enforcement of his right to claim damages,

discretion ought not to be exercised in favour of the plaintiff. But the mere fact that the plaintiff has made a reservation regarding reliefs should not debar from seeking reliefs in instalments. Even otherwise, if such a reservation is based on a mistake or misapprehension of the true position of facts and law, it cannot operate as an impediment in his way to seek the amendment.

(c) It is, no doubt, true that ordinarily *want of bona fides* will have a bearing on the exercise of discretion in granting or refusing the amendment. But, in the instant case, the want of good faith is not of such a nature as can be said to vitiate the exercise of discretion by the court in favour of allowing the amendment. If no substantial grounds are made out in support of the case proposed to be set up by the intended amendment, an inference of want of bona fides is permissible, but, in the instant case, it is clear that, on the allegations in the plaint, if substantiated, a case for the grant of relief of declaration and injunction can be said to have been established.

(d) The absence of the averments in the applicati on regarding the particulars of court-fee payable and such other procedural requirements relate to purely incidental matters relating to amendments which can always be remedied, but these defects do not vitiate the exercise of discretion in favour of allowing an amendment. and, in all such matters, it is the substance of the matter that has to be looked to than the form.

(e) The facts of the case of *A. K. Gupta and Sons Ltd.* v. *Damodar Valley Corporation*, A. I. R. 1967 S. C. 96 : (1966) 1 S. C. R, 796, were that a contract of work contained a clause to the effect that, in case of an increase in the prevailing labour rate of more than 10% the contractor would be entitled to charge proportionate increased rates. Subsequently, there was an increase in labaur rate by 20%. Consequently, a dispute arose between the parties as to whether under the clause the contractor was entitled to the whole of such amount or only part of it. Hence a suit was filed by the contractor claiming only a declaration that, on a proper interpretation of that clause, he was entitled to an enhancement of 20% over the tendered rates. The suit was decreed but, in appeal, it was held to be not maintainable in its form, in view of section 42 of the Specific Relief Act.

Hence, the plaintiff, while at the stage of appeal in the High Court, sought leave to amend the plaint by adding an extra relief for a decree for the money due on the contract or such other amount as was found to be due on a proper account being taken. The amendment was refused by the High Court and the matter was taken up in appeal before the Supreme Court. What is also of importance to note is that on the day this amendment of the relief, by introduction of specific money claim, was made, it was barred by time.

The Supreme Court, while allowing amendment, observed thus :

"In the matter of allowing amendment of pleading, the general rule is that a party is not allowed by amendment to set up a new case or a new cause of action particularly when a suit on the new cause of action is barred.

Where, however, the amendment does not constitute the addition of a new cause of action or raise a different case, but amounts merely to a different or additional approach to the same facts, the amendment is to be allowed even after expiry of the statutory period of limitation.

The expression 'cause of action' in the context of the provisions of Rule 17 of Order 6 does not mean every fact which is material to be proved to entitle the plaintiff to succeed. The expression only means a new claim made on a new basis constituted by new facts.

The words 'new case' mean new set of ideas.

Thus, no amendment will be allowed to introduce new set of ideas to the prejudice of any right acquired by any party by lapse of time."

It is clear from the above enunciation that, if an additional relief is claimed on the same set of facts and ideas, ordinarily the amendment in that regard ought not to be disallowed.

It is also manifest that even if there is a question of limitation, arising from lapse of time, which can be effectively raised by the defendant, it is permissible to allow an amendment by way of incorporation of additional relief so long as it is not based on a separate or distinct set of ideas.

(f) In the light of the above discussion, the discretion exercised by the trial court in favour of allowing the amendment in the instant case would be proper and reasonable.

If the leave to amend would prejudice a right already accrued to the other party on the pleadings as then standing, the leave should not be granted.

A plaint should not be allowed to be amended so as to take away a valid defence of limitation. This is the general rule. Thus, when a suit for loan alleged to have been taken on a particular day was dismissed as barred by limitation, an application for amendment so as to change the date of loan was refused. But, under special circumstances, even such amendment can be allowed. Thus where the plaintiff had acted with care and *bona fide* and made a mistake as to appropriate remedy due to a conflict of judicial opinion on the point, he was allowed to amend it even after the expiry of period of limitation. On similar grounds, addition of a new cause of action after the expiry of the period of limitation is generally refused.

Another ground for refusing to amend is when it is not *bona fide* and is made after great delay. When the amendment would introduce a totally new, different and inconsistent case and the application is made at a very late stage of the proceedings amendment is refused. In very rare cases, even such amendments. may be allowed, provided the application is made at a very early stage of the suit long before the trial and the change in the character of the suit is merely technical and not substantial. The rule is that an amendment must not change —

(i) the cause of action on which the original suit is based ;
(ii) the legal relation alleged to exist between the parties or
(iii) the specific title on which the plaintiff bases his claim.

In the case of *A. K Gupta and Sons Ltd.* v. *Damodar Valley Corporation*, A. I. R. 1967 S. C. 96 : (1966) 1 S. C R. 796, the plaintiff asked for recovery of certain moneys for different categories of work. The only dispute between the parties was whether the plaintiff was entitled to the whole amount of increase in accordance with the provisions of the contract or not. At the trial, a question arose as to whether the suit was maintainable in view of Section 42 of the Specific Relief Act because the plaintiff claimed a declaration that, on a proper interpre tation of the clause in the Contract, the plaintiff was entitled to an enhancement of 20 percent over the tendered rates. The plaintiff, after the decision of the High Court, sought leave to amend the plaint by adding an *extra relief* asking for a decree for Rs. 65,000. That application for amendment was the subject matter of the decisions of the Supreme Court. The Supreme Court observed as follows: —

(a) The expression 'cause of action, can mean a new claim made on a new basis constituted by new facts.

(b) The amendment seeks to introduce a claim based on the same cause of action, that is, same contract. It introduces no new case of facts. Indeed the facts on which the money claim sought to be added is based, are not in dispute. Even the amount of the claim now sought to be made by amendment, was mentioned in the plaint in stating the valuation of the suit for the purpose of jurisdiction.

Interference with order refusing application for amendment.— The Supreme Court said in *Satyadhan Ghosal* v. *Smt. Deorajin Debi*, A. I. R. 1960 S. C. 941 : 1963 S. C. R. 590, that an interlocutory order which had not been appealed from either because—

(a) no appeal lay, or

(b) even though an appeal lay, an appeal was not taken, can be challenged in an appeal from the final decree or order.

This decision is an authority for the proposition that, though an appeal could have been taken from the order refusing the application for amendment on the ground of limitation, yet the question can be agitated in appeal from the decree in as much as the order affects the decision from which an appeal has been preferred.

The Supreme Court referred to the decision of the Judicial Committee of the Privy Council in the case of *Maharaja Moheshur Singh* v. *Bengal Government*, (1859) 7 M.I.A. 283, where the Judicial Committee said that it is the duty

of the court to correct erroneous interlocutory orders though not brought under their consideration until the whole cause had been decided and brought by appeal for adjudication.

Amendment of plaint.—It is incumbent on the Court to see that the notice of the amended plaint was served on the defendants of the suit. The Code of Civil Procedure casts a duty on the Court to see that the defendants are made aware of any amendment in the plaint, whether the amendment be in regard to—

(a) the addition of parties ; or

(b) the contents thereof.

The court would commit a material irregularity in the exercise of its jurisdiction by disallowing the amendment on the ground that the *plea or ground* sought to be raised by the amendment was not available to the plaintiff. It should not go into that aspect on the merits of the amendment at that stage and errs in giving a finding on the merits of the amendment without even allowing the amendment in the first instance. (*Mangal Dass Sant Ram Gauba v. Union of India*, A. I. R. 1973 Delhi 96 (S. J.) ; *Krishna Rao* v. *Sri Gangadeswarar Temple*, A. I. R. 1949 Mad. 433 = (1949) I. M. L. J. 76).

Amendment of Written Statement.—So far as the amendment of the written statement is concerned,—

(a) an amendment setting up a case which is totally inconsistent with the original case set up will not be allowed, if it is unjust to the opposite side to allow it.

(b) similarly, where the proposed amendment of the written statement will have the effect of displacing plaintiff's suit, a court will refuse the application to amend the written statement.

(c) A defendant who has deliberately and under no mistake or misapprehension, admitted a material fact in his written statement, cannot be allowed at a later stage to change his front and make out a new case by denying that fact. There is no provision in the Civil Procedure Code to enable the court to permit the substitution of one written statement in toto for another already filed. (Vide *Steward v. North Metropolitan Tramways Co.*, [1885] 16 Q. B. D. 178 ; *Steward v. North Metropolitan Tramways Company*, [1886] 16 Q. B. D. 556 : 55 L. J. Q. B. 157 ; *Moss v. Malings*, [1886] 33 Ch, D. 603 : 56 L. J. Ch. 126 ; *Loutfi* v. *Czarnikow Ltd.*, [1952] 2 All E. R. 823 (n : 1952 W. N. 481 ; *Pirgonda Patil v. Kalgonda Shidgonda Patil*, A. I. R. 1957 S. C. 363 : 1957 S. C. R. 595 ; *Elangbam Mangi Sing v. Ngangban Tombi Singh*, A. I. R. 1967 Manipur 28 ; *Damodara Sastry v. Sanjviah*, A. I. R. 1955 Mys. 141 : I. L. R. (1955) Mys. 422 : *Jaldu Anentha Raghurama Arya v. Jaldu Bapanna Rao*, A. I. R. 1959 Andh. Pra. 448 : (1959) 1 Andh. W. R. 239 ; *Shriram Sardarmal v. Gouri Shankar*, A. I. R. 1961 Bom. 136 : 62 Bom. L. R. 336).

Amendment of written statement in appeal.—*Problem:*—The plaintiff's suit was for recovery of money on the strength of a promissory note exe-

cuted by the defendant on 28-1-62. The defendant admitted the execution of the promissory note. He, however, contended that no consideration passed thereunder and that it was given by way of a security on behalf of his brother-in-law who was alleged to have committed theft and was called upon to execute a promissory note. The plaintiff's suit was dismissed by the trial court.

The plaintiff accordingly filed an appeal. Arguments in the appeal were heard by the Subordinate Judge. When the plaintiff's advocate presented an argument in appeal that the defence case of theft in 1962 runs counter to his averment in the written statement that the theft was in 1963, the defendant was aroused to his senses. The Subordinate Judge reserved the Judgment to 25-9-67. On that day, the defendant filed an application before the appellate court for amendment of the written statement, alleging that, in written statement the year '1963' was a mistake for '1962' and that as it escaped the notice of the defendant by inadvertence, it should be allowed to be corrected.

The Subordinate Judge accepted the defendant's contention that the mistake was a *bona fide* one and escaped the notice of the defendant. Ht however, held that the amendment should not be allowed as it might affece the plaintiff's argument in appeal.

The question for determination is whether this order of the Subordinate Judge refusing amendment is justified.

Solution.—The Subordinate Judge reached the correct conclusion in saying that the year 1963 in a paragraph of the written statement was given by mistake for the year 1962 and this conclusion is based on the patent fact that the defendant admits the execution of the promissory note dated 28-1-62.

It can hardly be denied that the defendant was not vigilant nor diligent. But the amendment cannot be rejected in all cases where there is a lack of vigilance or diligence on the part of the defendant. The crucial test is whether what the defendant avers now is true or not. The Subordinate Judge fell into an error in the exercise of his jurisdiction in refusing amendment merely on the ground of delay and lack of vigilance. His view that, if the amendment is allowed at a late stage it would certainly be dangerous to the plaintiff's contention in appeal, is wholly untenable. If a mistake was committed by inadvertence and the Court is of opinion that the amendment should be allowed, inadvertent mistake cannot be permitted to continue merely because on its basis a contradiction had been shown and the argument already advanced in appeal was to fail. He should have allowed the amendment by compensating the plaintiff with costs. Mere delay by itself is not a ground for refusing amendment.

If a party who has obtained an order for leave to amend, *does not amend* accordingly within—

(a) the time limited for that purpose by the order ; or

(b) 14 days from the date of the order if no time is thereby limited,

he shall not be permitted to amend after the expiration of

(a) such limited time as aforesaid ; or

(b) such 14 days,

as the case may be, unless the time is extended by the Court. (O. 6, R. 18).

This Rule 18, thus, lays down the *effect of failure to amend after the orders of the Court.*

Appeal or revision against order allowing or disallowing amendment.—No appeal lies against an order allowing or refusing an amendment. The reason is that it is not an appealable order.

The view of the Allahabad High Court is that revision also does not lie against an order allowing or refusing amendment as it is an order of an interlocutory nature and is not a case decided within the meaning of section 115 of the Civil Procedure Code. (A. I. R. 1948 All. 221). The Oudh Chief Court and Judicial Commissioner's Court of Sind have also held likewise (1941 Oudh 6-3 and A. I. R. 1946 Sind 36).

The Nagpur High Court has, however taken a different view and has held that revision lies against an order refusing amendment of pleading. (A. I. R. 1946 Nag. 5).

Power of Court to take notice of events occurring subsequent to the institution of suit.—Ordinarily, no notice is taken by the Courts of events occurring after the suit, and the decree is passed with reference to the date on which the suit is instituted as nothing arising after the date of the suit can create new cause of action nor can it complete one formerly incomplete. Thus where the plaintiff has no cause of action at all to institute a suit, he will not ordinarily be allowed to take advantage of a cause of action arising subsequent to the suit and claim relief on that basis, nor where a plaintiff has a cause of action on the date of suit will relief be ordinarily refused to him on that basis by reason of subsequent events. If a suit for redemption is premature, it cannot be decreed because the period of mortgage has expired during its pendency.

Very often, however, the Courts do take notice of such events and even of events occurring during the appellate stage and permit the reliefs to be included on the basis of these events. This is ordinarily done—

(a) to avoid multiplicity of suits ;

(b) to do justice between the parties ;

(c) when the original relief claimed has, by reason of change in the circumstances, become inappropriate.

Sometimes, it is not merely in the power of the Court but it becomes its duty to take notice of subsequent events because if this were not done, the decision might be wholly infructuous. In *A. I. R. 1939 Nag. 242*, there was a mortgage executed in favour of B and D. B alone sued upon the mortgage. Pending the suit, D died and his right to recover the debt devolved upon B. It was *held* that, although B had no right to sue on the day of suit, he acquired the full and exclusive right when D died. Thus, the fact of death of D pending suit after the institution of the suit, was taken into account and the decree was given to B. In *A. I. R. 1944 Oudh. 422*, it

was observed that it is incumbent upon Courts of Justice to take notice of events which have happened since the institution of the suit and to mould its decree according to the circumstances as they stand at the time the decree is made. Consequently, in a suit against an Association by some of its members, the Court can take notice of the proceedings of a general meeting held by the Association after the institution of the suit. In *A. I. R. 1933 Sindh 371*, it was held that the general rule does not apply to partition suits and in them, the rights of the parties should be finally settled having regard to the events occurring upto the date of the decree. This principle was also upheld in *1937 Madras 200* and it was laid down that where a suit has been adjusted by a valid compromise and it is brought to the notice of the Court, the Court is bound to consider whether the suit has been adjusted by a compromise.

This discretionary power of departure from the general rule will not be exercised,—

(i) Where it would have the effect of taking away the jurisdiction of the Court.

(ii) Where there is great delay in making the application;

(iii) Where fresh enquiry into other facts becomes necessary;

(iv) Where the subsequent cause of action is said to arise by virtue of something done in the suit itself;

(v) if the subsequent cause of action is entirely different and distinct from the original one.

Where it is possible for the court to take notice of subsequent events, the court may allow amendments in the pleadings on those grounds. Thus, if pending a suit for declaration, defendant takes possession or plaintiff becomes entitled to possession, the plaintiff may be allowed to add a prayer for possession by way of amendment. Similarly, if pending a suit for partition by a plaintiff against his two brothers, one of the brothers dies, the plaintiff can amend the plaint and claim 1/2 share instead of 1/3.

Question often arises whether the Appellate Court may take cognizance of events occurring subsequent to the passage of the decree. Ordinarily, the rule is as stated above. Introduction of new rule, Order 41, rule 33, however, enables the Appellate Court to pass any order which ought to have been passed. It may also pass such further or other order or decree as the case may require. Thus, it is clear that the Appellate Court may give such judgment as ought to be given if the case came at that time before the Court of first instance.

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CHAPTER VI

PLAINT

Plaint.—Every suit is instituted by presenting a plaint to the Court or such officer as it appoints in this behalf.

Every plaint shall comply with the rules contained in Order VI (Pleadings generally) and VII (Plaint, so far as they are applicable. (Order 4, R. 1).

A plaint may be broadly divided into the following two parts :—

(i) The first part may be known as the *part dealing with the substantial portion.*

It consists of the cause of action, that is, the material facts on which the plaintiff claims relief.

(ii) The second part may be *formal one.*

It contains—

(a) the date on which the cause of action for the suit arose ;

(b) the facts bringing the suit within the jurisdiction of the court ; and

(c) the valuation of the suit for purposes of jurisdiction and court-fee. (or essential requisites of plaint).

Particulars to be contained in plaint.—(1) The plaint shall contain the *following particulars* :—

(a) the name of the Court in which the suit is brought ;

(b) the name, description and place of residence of the plaintiff ;

(c) the name, description and place of residence of the defendant, so far as they can be ascertained ;

(d) where the plaintiff or the defendant is a minor or a person of unsound mind, a statement to that effect ;

(e) the facts constituting the cause of action and when it arose ;

(f) the facts showing that the Court has jurisdiction ;

(g) the relief which the plaintiff claims ;

(h) where the plaintiff has allowed a set-off or relinquished a portion of his claim, the amount so allowed or relinquished ; and

(i) a statement of the value of the subject-matter of the suit for the purpose of jurisdiction and of court-fees, so far as the case admits. (O. 7, R. 1).

The *title of a suit* may be as follows :—

"In the Court of.....

Suit No.....of.....

A. B. son of....., aged.....years, resident of.....

.....Plaintiff

Against (or Versus)

C. D., son of....., aged...years, resident of.....

.....Defendant."

The *description of party* may also be as follows :—

"A. B. son of....., aged.....years, resident of....., Kanpur, by his constituted attorney C. D., son of....., aged.....years, resident of...Kanpur."

(b) **Name, description and place of residence of plaintiff.**—Where a suit is instituted by partners in the name of their firm the plaintiffs or their pleader shall,

on demand in writing by, or on behalf of, any defendent, forthwith declare in writing the names and places of residence of all the persons constituting the firm on whose behalf the suit is instituted. (O. 30, R 2 (1))

Every *suit by a minor* is instituted in his name by a person who, in such suit, is called the *next friend of the minor* (O. 32, R 1)

Along with such a suit, an application by the next friend should be filed for the purposes of appointing him as the next friend. It is necessarily implied.

Where the suit is instituted without the next friend according to Rule 2 the defendant is entitled to apply to have the plaint taken off the file, with costs to be paid by the pleader or other person by whom it was presented. After hearing the objections, the Court is empowered to pass such order as it thinks fit under Rule 2.

The *description of the plaintiff minor* may be as follows :—

"A. B., a minor, son of.....resident of....., Allahabad, by

C. D. (or by the Court of Wards), his next friend

.....plaintiff"

Rules 1 and 2 are silent as to how the dispute, if it arises, as to whethe the plaintiff is a minor or not, is to be decided.

(c) **Name, description and place of residence of defendant.**—*Where the defendant is a minor*, the court, on being satisfied of the fact of his minority, appoints a proper person to be guardian for the suit for such minor. (O. 32, R. 3 (1).

Appointment of guardian of a minor defendant in a suit.—An order (of the court) for the appointment of a guardian for the suit may be obtainedr upon application—

(a) in the name and on behalf of the minor ; or

(b) by the plaintiff. (O. 32, R. 2).

Such application shall be supported by an affidavit verifying the fact that —

(a) the proposed guardian has no interest in the matters in controversy in the suit, adverse to that of the minor ; and

(b) he is a fit person to be so appointed. (O. 32, R. 3).

No order shall be made on the application except—

(a) upon notice--

(i) to the minor ;

(ii) to any guardian of the minor appointed or declared by an authority competent in that behalf ;

(iii) where there is no such guardian, to the father or other natural guardian of the minor ; and

(iv) where there is no father or other natural guardian, to the person in whose care the minor is ; and

(b) after hearing any objection which may be urged on behalf of any person served with the notice. (O. 32, R. 4).

It was held in the case of *Kasi Doss* v. *Kassim Sait*. I. L. R. (1893) 16 Mad. 344, that on minority being alleged and denied,—

(a) a guardian should be appointed for the purposes of the inquiry ;

(b) a preliminary issue should be recorded raising the question whether or not the defendant is a minor ;

(c) it should be tried and adjudicated upon the same way in which any other material issue is tried and decided ;

(d) if the defendant is found to be a minor, a guardian for the suit should be appointed for him ; and

(e) if he is found not to be a minor, the guardian appointed for the inquiry s hould cease to act, the defendant conducting his own case.

To the same effect is the case of *Ramgobind* v. *Sital Singh*, A. I. R. 192 , Pat. 489 : 96 I. C. 273, where Adami, J. held.

"If there is any doubt as to the minority of the defendant, that question ought to be made an issue in the case and the court ought to decide whether it is a case in which a guardian ought to be appointed.

It is not sufficient for the court by just looking at the defendant to come to a conclusion that he is not a minor."

In re, *K. Narasimha Bhattachariar*, A. I. R. 1939 Mad. 657 : (1938) 2 M. L. J. 810, it was held :

"Where the court has permitted the plaintiff to sue by his next friend, till that order is set aside, it is not competent to raise an issue as to the question whether the plaintiff is incapable of protecting his interest then suing or being sued.

Once plaintiff is permitted to sue by the next friend, the authority of the next friend cannot be questioned by an issue raised in the suit, unless by a substantive application the authority of the next friend is revoked, it would not be competent to raise an issue in answer to the claim."

A person appointed to be guardian for the suit for a minor, unless his appointment is terminated by—

(a) retirement ;

(b) removal ; or

(c) death,

continues as such throughout all proceedings arising out of the suit, including—

(a) proceedings in any appellate or revisional court ; and

(b) any proceedings in the execution of a decree. (O. 32, R. 5),

Who may act as next friend of a minor plaintiff or be appointed guardian for a minor defendant.—Any person—

(a) who is of sound mind ;

(b) who has attained majority,

(c) whose interest is not adverse to that of the minor ;

(d) who is not, in the case of a next friend, a defendant ;

(e) who is not, in the case of a guardian for the suit, a plaintiff,

may act as next friend of a minor or as his guardian for the suit. (O. 32, R. 4 (1)).

Where a minor has a guardian appointed or declared by competent authority, no person other than such guardian shall act as the next friend of the minor or be appointed his guardian for the suit unless the Court considers, for reason to be recorded, that it is for the minor's welfare that another person be permitted to act or be appointed, as the case may be. (O. 32, R. 4 (2)).

No person shall without his consent be appointed guardian for the suit. (O. 32, R. 4 (3)).

Where there is no other person fit and willing to act as guardian for the suit, the Court may—

(a) appoint any of its officers to be such guardian ;

(b) direct that the costs to be incurred by such officer in the performance of his duties as such guardian shall be borne—

(i) by the parties ; or

(ii) by any one or more of the parties to the suit ; or

(iii) out of any fund in court in which the minor is interested ; and

(c) give directions for the repayments or allowance of such costs as justice and the circumstances of the case may require. (O. 32, R. 4 (4)).

Duties of next friend or guardian for the suit.—1. A next friend or guardian for the suit shall not, without the leave of the court, *receive any money or other movable property* on behalf of a minor,—

(a) by way of compromise before decree or order ; or

(b) under a decree or order in favour of the minor.

Where the next friend or guardian for the suit—

(a) has not been appointed or declared by competent authority to be guardian of the property of the minor ; or

(b) having been so appointed or declared, is under any disability known to the court to receive the money or other movable property,

the court shall, if it grants him leave to receive the property, require such security and give such directions as will, in its opinion, sufficiently protect the property from waste and ensure its proper application. (O. 32, R. 6).

2. No next friend or guardian for the suit shall, without the leave of the court, expressly recorded in the proceedings, enter into any *agreement or compromise on behalf of a minor* with reference to the suit in which he acts as next friend or guardian.

Any such agreement or compromise entered into without the leave of the court so recorded, is voidable against all parties other than the minor. (O. 32, R. 7).

Retirement of next friend.—Unless otherwise ordered by the court, a next friend shall not retire without—

(a) first procuring a fit person to be put in his place ; and

(b) giving security for the costs already incurred.

The application for the appointment of a new next friend is supported by an affidavit showing—

(a) the fitness of the person proposed ; and

(b) that he has no interest adverse to that of the minor. (O. 32, R. 8).

Removal of next friend.—Where—

(a) the interest of the next friend of a minor is adverse to that of the minor ; or

(b) he is so connected with a defendant whose interest is adverse to that of the minor as to make it unlikely that the minor's interest will be properly protected by him ; or

(c) he does not do his duty ; or

(d) during the pendency of the suit, he ceases to reside within India ; or

(e) for any other sufficient cause,

application may be made on behalf of the minor or by a defendant for his removal.

The court, if satisfied of the sufficiency of the cause assigned, may—

(a) order the next friend to be removed accordingly ; and

(b) make such other order as to costs as it thinks fit. (O. 32, R. 9 (1)).

Where—

(a) the next friend is not a guardian appointed or declared by an authority competent in this behalf ; and

(b) an application is made by a guardian so appointed or declared, who desires to be himself appointed in the place of the next friend,

the court shall—

(a) remove the next friend unless it considers, for reasons to be recorded by it, that the guardian ought not to be appointed the next friend of the minor; and

(b) thereupon appoint the applicant to be next friend in his place upon such terms as to the costs already incurred in the suit as it thinks fit. (O. 32, R. 9 (2)).

Stay of proceedings on removal, etc., of next friend.—(1) On the retirement, removal or death of the next friend of a minor, further proceedings shall be stayed until the appointment of a next friend in his place.

(2) Where the pleader of such minor omits, within a reasonable time, to take steps to get a new next friend appointed any person interested in the minor or in the matter in issue may apply to the Court for the appointment of one, and the Court may appoint such person as it thinks fit. (O. 32, R. 10).

Retirement and removal of guardian for the suit.—Where—

(a) The guardian for the suit desires to retire ; or

(b) he does not do his duty ; or

(c) other sufficient ground is made to appear,

the court may—

(a) permit such guardian to retire ; or

(b) remove him; and,

(c) make such order as to costs as it thinks fit.

(O. 32, R. 11 (1)).

Appointment of new guardian for the suit.—Where, during the pendency of the suit, the guardian for the suit—

(a) retires ;

(b) dies ; or

(c) is removed by the court,

the Court shall appoint a new guardian in his place. (O. 32, R. 11 (2)).

Course to be followed by minor plaintiff or applicant on attaining majority.—(1) A minor plaintiff or a minor not a party to a suit on whose behalf an application is pending shall, on attaining majority, elect whether he will proceed with the suit or application.

(2) Where he elects to proceed with the suit or application, he shall apply for an order discharging the next friend and for leave to proceed in his own name.

(3) The title of the suit or application shall in such case be corrected so as to read henceforth thus :

"A. B., late a minor, by C. D., his next friend, but now having attained majority."

(4) Where he elects to abandon the suit or application, he shall, if a sole plaintiff or sole applicant, apply for an order to dismiss the suit or application on repayment of the costs incurred by the defendant or opposite party or which may have been paid by his next friend.

(5) Any application under this rule may be made *ex parte* : but no order discharging a next friend and permitting a minor plaintiff to proceed in his own name shall be made without notice to the next friend. (O. 32, R. 12).

Where minor co-plaintiff attaining majority desires to repudiate suit.—(1) Where a minor co-plaintiff on attaining majority desires to repudiate the suit, he shall apply to have his name struck out as co-plaintiff; and the Court, if it finds that he is not a necessary party, shall dismiss him from the suit on such terms as to costs or otherwise as it thinks fit.

(2) Notice of the application shall be served on the next friend, on any co-plaintiff and on the defendant.

(3) The costs of—

(a) all parties of such application ; and

(b) all or any proceedings heretofore had in the suit, are paid by such persons as the Court directs.

(4) Where the applicant is a necessary party to the suit, the Court may direct him to be made a defendant. (O. 32, R. 13).

Unreasonable or improper suit.—A minor sole plaintiff, on attaining majority, may apply that the suit instituted in his name by his next friend be dismissed on the ground that it was unreasonable or improper.

Notice of the application is served on all the parties concerned.

The court, upon being satisfied of such unreasonableness or impropriety, may—

(a) grant the application ; and
(b) order the next friend to pay the costs of all parties in respect of the application and of anything done in the suit ; or
(c) make such other order as it thinks fit. (O. 32, R. 14).

Suits by or against persons of unsound mind.—The provisions relating to suits by or against a minor extend, so far as they are applicable, to persons—

(a) adjudged to be of unsound mind ; and
(b) who though not so adjudged, are found by the court, on inquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued. (O. 32, R. 15).

The *description of party* in a suit *who is a person of unsound mind* or of weak mind, may be as follows :—

"A. B., son of.....,aged.....years, resident of.....,Allahabad, a person of unsound mind (or of weak mind) by C. D., his next friend.

.....Plaintiff or Defendant.".

In the case of *Govindayya* v. *Ramamurthi*, A. I. R. 1941 Mad. 524 (D. B.) : (1941) 1 M. L. J. 354, it was observed :

"What is contemplated is that the plaint must be filed by a next friend and the court, before admitting the plaint, should satisfy itself on enquiry that the person on whose behalf the plaint is presented, was by reason of unsoundness of mind, incapable of protecting his interests and should be represented by a n xt friend.

Ordinarily, the next friend ought to file an application supported by an affidavit along with the plaint, and the Judge should pass an order thereon.

All that is needed is that there should be some *prima facie* proof such as to satisfy the court that the person was by reason of unsoundness of mind or mental infirmity, incapable of protecting his interests, because an order permit-

ting the next friend to represent such a person is not final. It is always open to the defendant to take out an independent application to have the said order revoked when the court can go fully into the matter. But when once the court permits the next friend to sue on behalf of such a person, it is not open to the court to raise an independent issue in the trial as to the competency of the next friend to represent him in the suit."

This Rule 15 places persons of unsound mind in the same position as minors and makes the provisions of Rules 1 to 14 applicable to them. It will thus be clear that persons who are of unsound mind or are suffering from mental infirmity and are thereby incapable of protecting their interests, are placed on the same footing as minors for the purpose of legal proceedings by or against them. It must, however, be remembered that Order 32 deals only with procedure. It does not confer on minors or persons of unsound mind any right of any sort.

Rule 15 postulates an inquiry, if the unsoundness of the mind of the plaintiff and the fact that he was incapable of protecting his interests are disputed by the defendants.

Before or after any such inquiry is made, the judicial authorities lay down the procedure as to how the applications under Order 32, whether they fall under Rule 1 or Rule 15, should be disposed of.

When an application is filed on behalf of the next friend alleging that the plaintiff is either a minor or is of unsound mind, along with the suit which the next friend has instituted in the name of the minor or the insane, ordinarily *notice* should be given *to the defendants* to find out whether they desire to contest the application.

In some cases, however, it is held that an *ex parte order* can be passed on such an application if the court is satisfied that *prima facie* the plaintiff is a minor or insane and as such incapable of looking after his interests, for appointment of a next friend. Such an order obviously would not be final. Since the order in such a case would be passed behind the back of the defendant, it is always open to him to question the correctness of the order. If he fails to question the correctness of such an order during the trial of the suit, he would not be permitted to raise the objection that the plaintiff was not minor or insane at the time when the suit was instituted or that he was incapable of protecting his interests, for the first time in appeal.

If the defendant, however, chooses to dispute the correctness of that order he can ask the trial court which had passed the ex-parte order, to make the necessary inquiry into the question whether the allegations made by the next friend are correct, The Court is bound to reopen the question and make a proper inquiry in that behalf. In such a case, after inquiry, if it is found that the plaintiff was minor or insane and was incapable of looking after his interests on the date when the suit was instituted, the Court can permit the guardian or the next friend to continue the suit. And in case it is found that the plaintiff was not a minor or insane on the date of the institution of the suit and there was no necessity for the guardian or the next friend to represent him, proper orders in that behalf should be passed.

When

(a) the defendant raises an objection and questions the allegations made in the petition that the plaintiff is minor or insane and is, therefore, incapable of looking after his interests ; and

(b) (i) no ex-parte order is passed ; or

(ii) even if it is passed and is questioned by the defendant,

this question has to be tried as a preliminary issue before any other matter is considered or disposed of in the suit ;

and, for the purpose of such an inquiry, the court will have a tentative order either—

(a) with the consent of the defendant, or

(b) on *prima facie* material before it,

allowing the guardian or the next friend to continue to represent the plaintiff until the inquiry is over.

Any decision given on such an inquiry would be binding upon the parties in so far as the trial court is concerned. But when ultimately the matter goes in appeal as consequence of the trial of the suit, it is open to the appellate court to see whether the order appointing the next friend or the guardian was validly made and, in that connection, the appellate court can certainly go into the question whether the plaintiff, on the date when the suit was instituted, was minor or insane and was consequently incapable of protecting his interests.

In any case, the inquiry and the determination of such a question would be only under rule 1 or rule 15. The *purpose and the scope of the inquiry* obviously is very much limited, the purpose being to give proper representation to the plaintiff who is minor or insane. The law as a general principle treats all acts of an infant which are for his benefit, on the same footing as those of an adult but will not permit him to do anything prejudicial to his own interests. This principle regulates not only the infant's capacity to acquire and dispose of property but also is acknowledged in reference to legal proceedings instituted by or against him. The scope of the inquiry, therefore, has to be only limited for the procedural purposes that is to say, to give proper representation to the plaintiff if he is found to be insane or minor on the date when the suit was instituted. The inquiry is not, therefore, expected to travel beyond this limited field.

Any order passed under Rule 15 does not finally decide as to whether the plaintiff was insane at the time when the transactions attacked in the suit were entered into by him. That is a matter which has to be expressly made a subject of issue and will have to be gone into like any other issue in a regular trial and will have to be ultimately decided in the suit itself.

When the question which arises in the petition under Rule 15 and which arises in the main suit itself is the same, greater care is required to be taken to see that any order passed under Rule 15 does not transgress its legitimate limits and thus allowed to affect the main question involved in the suit.

The order under Rule 15 is not made appealable under Order 43, C. P. C. The High Court, however, can, in appropriate cases, revise the order under section 115, C. P. C. That does not, however, preclude the defendants from raising the objection at the time of the appeal, if it becomes necessary, that the order appointing the next friend of the plaintiff was passed either because the plaintiff was not insane or of weak mind within the meaning of Rule 15 on the day when the suit was instituted or was not capable of looking after his own interests. The Appellate Court will have to go into that question.

It is true that the order appointing the next friend does not deal with—

(a) the subject-matter of the suit, or

(b) the issues involved in it.

But the very fact whether the suit is maintainable or not as is filed by the next friend, can certainly be gone into in appeal as it affects the very basis of the suit. (*Govindayya* v. *Ramamurthi*, A. I. R. 1941 Mad. 524 (D. B.)). In this case, the Madras High Court went into the question in appeal as to whether the finding in regard to the unsoundness of mind was correct.

It may be that if the defendants had not raised the objection in regard to the unsoundness of the mind of the plaintiff on the day when the suit was instituted, they would have been precluded for the first time to raise it in an appeal as is held by Shah, J., in *Bai Dahi* v. *Ghanshyam*, A. I. R. 1956 Bom. 102. It, however, necessarily follows from this Bombay decision also that if the defendants raise the objection, such an objection can be gone into in the regular appeal.

(b) and (c).—Name of plaintiff or defendant.—In a *suit by or against the Government*, the authority to be named as plaintiff or defendant is—

(a) the Union of India, in the case of a suit by or against the Central Government ; and

(b) the State, in the case of a suit by or against a State Government. (Section 79 of Civil Procedure Code).

In suits by or against the Government, instead of inserting in the plaint the name and description and place of residence of the plaintiff or defendant, it is sufficient to insert the appropriate name as provided in section 79, C. P. C. (O. 27, R. 3),

Therefore, in suits by or against a State Government, the plaintiff or defendant may be 'The State of Kerala' or 'The State of Uttar Pradesh,' as the case may be.

(e) Cause of action.—"Cause of action" means the cause or the set of circumstances which lead upto a suit. The term connotes every fact which it is necessary for the plaintiff to prove in order to entitle him to a decree in the suit. It does not, however, comprise every piece of evidence which is necessary to prove each fact, but every fact, which is necessary to be proved to entitle the plaintiff to a decree.

It is, in other words, a bundle of essential facts which it is necessary for the plaintiff to prove before he can succeed in the suit.

The cause of action is antecedent to the institution of the suit, and every plaint must disclose a cause of action when alone the Court will be able to proceed to a determination of the dispute.

Date of cause of action.—It is not always easy to determine on which date the cause of action for a suit arose. Facts constituting the cause of action for a suit may occur on different dates and certainly all those dates are not required to be mentioned in this paragraph of the plaint. P. C. Mogha observes, "The date of accrual of cause of action to be mentioned in the plaint is.....the date of that event which makes the cause of action for the suit complete, in other words which gives the plaintiff the right of suit, *e. g.*, in case of breach of contract, the date of breach. It should be distinguished on the one hand from the date of any other previous fact which is part of the cause of action (*e.g.*, date of contract, and, on the other hand, from that of any subsequent event which is not material as part of the cause of action, though it may have been the exciting cause for the suit (*e. g.*, the date of demand of

damages and defendant's refusal)." The best thing is to mention the date of the starting point of limitation as that of the accrual of the cause of action.

There is a general impression among the members of the legal profession that it is necessary to make a demand for money due on a pronote (though payable on demand) or arrears of rent before a suit for their recovery can lie. This impression is, however, fallacious. The fact of demand and refusal do not constitute cause of action and consequently the cause of action cannot be said to arise on the date of demand and refusal. This, however, excludes the case of a pronote payable at sight where presentation is a necessary part of the cause of action.

Some typical *instances of accrual of cause of action* are as follows :—

(*a*)	In suit for damages for breach of contract.	The cause of action arises	on the date of breach.
(*b*)	In suits for damages for tort.	"	on the date when the tort was committed.
(*c*)	In suits for ejectment.	"	on the date on which plaintiff's right to sue accrued.
(*d*)	In suits for possession of property alienated by Hindu widow.	"	on the date of death of the widow.
(*e*)	Suits for money due on pronote.	"	on the date of the pronote.
(*f*)	In suits on series of loan.	"	between—and—on the day each loan is taken.

(f) Facts showing jurisdiction of Court.—Under clause (f) of Rule 1 of Order 7, the plaint shall contain the facts showing that the Court has jurisdiction.

What is required to be mentioned in the plaint in the paragraph pertaining to the jurisdiction of the Court is not merely the fact that the Court has jurisdiction but the facts showing that the Court has jurisdiction.

Generally speaking, this paragraph should be framed in any one of the following ways, as the case may be :—

The defendant resides at Saharanpur within the jurisdiction of this Court.

Or

The property in respect of which this suit is brought lies within the jurisdiction of this Court.

Or

The bond was executed and money borrowed at Simla, within the jurisdiction of this Court.

Or

The money payable under the contract was made payable at Allahabad, within the jurisdiction of this Court.

Or

The defendant caused the wrong complained of in this plaint at Fatehpur, within the jurisdiction of this Court.

Principles governing jurisdiction of Courts.—1. The Civil Court has jurisdiction to try all suits of a Civil nature except those of which its cognizance is barred under any local law. (*Ram Awalamb* v. *Jata Shankar*, A. I. R. 1969 All. 526 (F. B.) 1968 A. L. J. : 1108, 1968 A. W. R. (H. C.) 731).

Under section 9 of the Code of Civil Procedure, a Civil Court can entertain a suit of a Civil nature except a suit of which its cognizance is either expressly or impliedly barred. (*Abdul Waheed Khan* v. *Bhawani*, A. I. R. 1966 S. C. 1718 : 1966 M. P. L. J. 954 : 1966 Jab. L. J. 1022).

2. It is for the party who seeks to oust the jurisdiction of a Civil Court, to establish its contention. (*Abdul Waheed Khan* v. *Bhawani*, A. I. R. 1966 S. C. 171).

3. A statute ousting the jurisdiction of the Civil Court must be strictly construed. (*ibid*).

4. It is the cause of action which determines the jurisdiction of a Court. (*Ram Awalamb* v. *Jata Shankar*, A. I. R. 1969 All. 526 (F. B.) at page 536 : 1968 A. L. J. 1108).

So far as the first paragraph of section 4 of the Bihar Money-lenders (Regulation of Transactions) Act, VII of 1939 is concerned which provides as follows :

"No court shall entertain a suit by a money-lender for the recovery of a loan advanced by him after the commencement of this Act unless such money-lender was registered under the Bihar Money-lenders Act, 1938 at the time when such loan was advanced.....".

the impediment is on the courts in entertaining suits by money-lenders for recovery of loans advanced by them, unless such money-lenders are registered under the Bihar Money-lenders Act, 1938, when the loans were advanced.

Unless a plaintiff pleads in his plaint facts which would make the suit *prime facie* entertainable by the court, it can hardly be said that the plaintiff has discharged the duty put upon him by Rule 1 (f) of Order 7 of the Code of Civil Procedure.

It may be that the defendant has to put forward the plea in bar in his written statement, but the question still remains to be answered as to what will follow thereafter. Their Lordships of the Supreme Court have stated in the case of *K. S. Nanji and Co.* v. *Jatashanker Doss*, A. I. R. 1961 S. C. 1474 : 1961 B. L. J. R. 514, that, under the Evidence Act, there is an essential distinction between the phrase 'burden of proof' as a matter of law and 'pleading' as a matter of adducing evidence. Their Lordships have stated that, under section 101 of the Evidence Act, the burden, in the former sense, is upon the party who comes to court to get a decision on the existence of certain facts which he asserts and that burden is constant throughout the trial ; but the burden of proof, in the sense of adducing evidence, shifts from time to time, having regard to the evidence adduced by one party or the other or the presumption of fact or law raised in favour of one or the other.

On this interpretation of law, the essential onus to prove that a suit is not hit by section 4 of the said Bihar Act No. VII of 1939 and is maintainable, must be upon the plaintiff. It may be that even some slight evidence

adduced by the plaintiff will shift the burden on the defendant to prove that the suit is not entertainable by the court, but that burden on the defendant is a burden 'as a matter of adducing evidence." The second kind of burden has been characterised as 'shifting' burden and that is laid down in section 102 of the Evidence Act whereas the onus of proof under section 101 of the Evidence Act is inflexible. Therefore, it must be held that the onus to prove as a matter of law that the suit is entertainable without registration, is on the plaintiff, in view of the bar under the first paragraph of section 4 of the said Bihar Act No. VII of 1939.

The rules for determining the forum for a suit (or the place of suing) have been laid down in various sections of the Code of Civil Procedure, which are stated below :—

1. In which court.—Every suit shall be instituted in the *court of the lowest grade* competent to try it. (Section 15).

Section 6 of the Code of Civil Procedure deals with *pecuniary jurisdiction.* It lays down that, save in so far as is otherwise expressly provided, nothing herein contained shall operate to give any court jurisdiction over suits, the amount or value of the subject-matter of which exceeds the pecuniary units (if any) of its ordinary jurisdiction.

If the trial court has jurisdiction to entertain the suit, it has the necessary power or jurisdiction to pass all necessory and appropriate orders in it.

2. Where subject matter situate. —Suits,—

subject to the pecuniary or other limitations prescribed by any law,

(a) for the recovery of *immovable property* with or without rent or profits ;

(b) for the partition of immovable property ;

(c) for—

(i) foreclosure,
(ii) sale, or
(iii) redemption,

in the case of a mortgage of or charge upon immovable property ;

(d) for the determination of any other right, or interest in, immovable property ;

(e) for compensation for wrong to immovable property ;

(f) for recovery of *movable property* actually under distraint or attachment,

shall be instituted in the court within the local limits of whose jurisdiction the property is situate.

But a suit to obtain—

(i) relief respecting immovable property, or

(ii) compensation for wrong to immovable property,

held by, or on behalf of, the defendant,

and where the relief sought can be entirely obtained through his personal obedience.

may be instituted either—

(i) in the court within the local limits of whose jurisdiction the property is situate, or
(ii) in the court within the local limits of whose jurisdiction the defendant—
(a) actually and voluntarily resides, or
(b) carries on business, or
(c) personally works for gain. (Section 16).

Suit for immovable property situate within jurisdiction of different courts.—Where a suit is to obtain—
(i) relief respecting immovable property, or
(ii) compensation for wrong to immovable property,
situate within the jurisdiction of different courts,

the suit may be instituted in any court within the local limits of whose jurisdiction any portion of the property is situate.

But, in respect of the value of subject-matter of the suit, the entire claim is cognizable by such court. (Section 17).

Uncertain local limits of jurisdiction of courts.—Where it is alleged to be uncertain within the local limits of the jurisdiction of which of two or more courts any immovable property is situate,

any of these courts may, if satisfied that there is ground for the alleged uncertainty,—
(a) record a statement to that effect ; and
(b) thereupon proceed to entertain and dispose of any suit relating to that property.

[But the suit must be one with respect to which the Court is competent as regards
(i) the nature of the suit ; and
(ii) the value of the suit,

to exercise jurisdiction. (Section 18 (1)).

Suit for compensation for wrongs to person or movables.—Where a suit is for compensation for wrong done to—
(a) the person ; or
(b) movable property,

and the wrong was done within the local limits of the jurisdiction of one court,

and the defendant—
(a) resides, or
(b) carries on business, or
(c) personally works for gain,

within the local limits of the jurisdiction of another court,

the suit may be instituted, at the option of the plaintiff in either of the said court, (Section 19).

Illustrations

(a) A, residing in Delhi, beats B in Calcutta. B may sue A either in Calcutta or in Delhi.

(b) A, residing in Delhi, publishes in Calcutta statements defamatory of B. B may sue A either in Calcutta or in Delhi.

Other suits to be instituted where defendants reside or cause of action arises.—Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction—

(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain ; or

(b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiece in such institution ; or

(c) the cause of action, wholly or in part, arises.

Explanation I.—Where a person has a permanent dwelling at one place and also a temporary residence at another place, he shall be deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary residence.

Explanation II.—A corporation shall be deemed to carry on business at its sole or principal office in India or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place.

Illustrations

(a) A is a tradesman in Calcutta. B carries on business in Delhi. B by his agent in Calcutta, buys goods of A and requests A to deliver them to the East Indian Railway Company. A delivers the goods accordingly in Calcutta. A may sue B for the price of the goods either in Calcutta, where the cause of action has arisen, or in Delhi, where B carries on business.

(b) A resides at Simla, B at Calcutta and C at Delhi. A, B and C being together at Banaras, B and C make a joint promissory note payable on demand, and deliver it to A. A may sue B and C at Banaras where the cause of action arose. He may also sue them at Calcutta, where B resides, or at Delhi, where C resides ; but in each of th se causes, if the non-resident defendant objects, the suit cannot proceed without the leave of the Court. (Section 20).

Clause (a).—S. C. was the owner of 5 original shares in a Rubber Estate in Malacca. On 9-12-1912, he died leaving behind him his widow and his son plaintiff S. In August, 1913, the attorney of the widow of S C took out letters of administration to his estate. On July 16, 1915. while both S and the defendant were at Malacca, they entered into a compromise agreement. S, the defendant and certain others were the partners in a firm at Malacca. Under this compromise agreement, both agreed that, out of the aforesaid 5 shares in the Rubber Estate, 2 1/2 shares would belong to the said firm then represented by the defendant as the managing partner, and the remaining 2 1/2 shares would belong to S. Under this compromise, the defendant agreed and undertook to recover the 5 shares and to account to S for the 2 1/2 shares belonging to him,

On January 7, 1924, while S and the defendant were at Malacca, they entered into an agreement, under which S transferred his remaining 2 1/2 shares in the Rubber Estate to the defendant on receipt of 18,000 dollars as consideration.

On September 14, 1927, S instituted a suit against the defendant in the court of the Subordinate Judge, D place, in India, asking for—

(i) a declaration that—

(a) he was entitled to the original 5 shares ;

(b) the agreements were void ; and

(ii) accounts and consequential reliefs.

The plaintiff S alleged that the transactions of 16-7-1915 and 7-1-1924 were vitiated by fraud and fraudulent concealment. The fraud was committed on 7-1-1924 and was discovered on or about 16-4-1924.

The defendant was outside India for several months in 1926. On the date of the filing of the suit, the defendant was residing at a place P within the jurisdiction of the court of the Subordinate Judge at the place D. Therefore, it must be held that the court of Subordinate Judge had jurisdiction to entertain and try the suit and the Indian Limitation Act was applicable to the suit though the cause of action may have arisen outside India.

Clause (c)—Cause of action.—The term 'cause of action', though nowhere defined, is now very well understood. It means every fact which will be necessary for the plaintiff to prove if traversed in order to support his right to the judgment. (*Mohammad Khalil Khan* v. *Mahbub Ali Mian*, A. I. R. 1949 P. C. 78; I. L. R. (1948) All. 571 ; *Ram Awalamb* v. *Jata Shankar*, A. I. R. 1969 All. 526 (F. B.) ; 1968 A. L. J. 1108 : 1968 A. W. R. (H. C.) 731).

If the basic evidence to support the two claims is different, hen the *causes of action*, are also *different*. (*Mohammad Khalil Khan* v. *Mahbub Ali Mian*, A. I. R. 1949 P. C. 78). For example, the cause of action for a suit based on title will be different from the cause of action for a suit based on possession under section 9 of the Specific Relief Act.

In each and every case, the cause of action of the suit shall have to be strictly scrutinised to determine whether the suit is—

(i) solely cognizable by a revenue court ; or

(ii) impliedly cognizable only by a revenue court ; or

(iii) cognizable by a civil court.

Where, in a suit, from a perusal only of the reliefs claimed, one or more of them are ostensibly cognizable only by civil court and at least one relief is cognizable only by the revenue court, further questions which arise are—

(i) whether all the reliefs are based on the same cause of action and, if so,—

(ii) (a) whether the main relief asked for on the basis of that cause of action is such as can be granted only by a revenue court ; or

(b) whether any real or substantial relief (though it may not be identical with that claimed by the plaintiff) could be granted by the revenue court.

In all cases contemplated under (a) and (b) above, the jurisdiction shall vest in the revenue court and not in the civil court.

In all other cases of a civil nature, the jurisdiction must vest in the civil court. (*Ram Awalamb* v. *Jata Shankar*, A. I. R. 1969 All. 526 (F. B.) : 1968 A. L. J. 1108 ; 1968 A. W. R. (H. C.) 731).

The main point for consideration in all cases where, on a definite cause of action, two reliefs can be claimed, is which of the two reliefs is the main relief and which relief or other reliefs are ancillary reliefs. Where, from facts and circumstances of the case, the relief for demolition and injunction is the main relief, there can be no reason why the jurisdiction of the civil court should be barred. On the other hand, if it can be said that the main relief, that is to say, the real and substantial relief, can, on that cause of action, be of possession only, then the suit will definitely lie in the revenue court. It is difficult to lay down any hard and fast rule that where the suit is brought against a trespasser, the only relief which the plaintiff should claim as effective relief, is that of posssesion and he need not try to obtain an injunction order and get the constructions made by the trespasser demolished. The revenue courts have not been empowered to grant the reliefs of injunction and demolition and in case the defendant refuses to take away the materials from the land in dispute after the decree for possession has been passed against him, the main object of the plaintiff would be frustrated. A civil court will, therefore, have the power to entertain the suit where the main relief sought by the plaintiff is that of injunction and demolition—a relief which can be granted by the civil court only. The relief of possession will be merely ancillary relief which the civil court can grant after having taken cognizance of the suit for injunction and demolition. (*ibid*).

Once the suit is maintainable for the main relief in the civil court, then there is no bar for the civil court to grant all possible reliefs flowing from the same cause of action. (*Mewa* v. *Baldeo*, A. I. R. 1967 All. 358 (D. B.) : 1966 A. L. J. 1084 ; *Ram Awalamb* v. *Jata Shankar*, A. I. R. 1969 All. 526 (F. B.). In the first case, it was held by a Division Bench of the Allahabad High Court that where the suit was for cancellation of a sale deed on the ground of fraud and for possession, the main relief is for cancellation of document and, therefore, the ancillary relief for possession can also be granted by the civil court. The second Full Bench case differed from the view taken by the Division Bench in the case of *Mukteshwari Prasad Tewari* v. *Ram Wali*, I. L. R. (1966) 1 All. 196 (D. B.) : 1965 A. L. J. 1137 that whenever a suit is for demolition and possession against a trespasser, it must always be held that the main relief is that of possession. The Full Bench held that the determination of the question as to which out of the several reliefs arising from the same cause of action, is the main relief, will depend on the facts and circumstances of each case. It was further held that where, on the basis of a cause of action,—

(a) the main relief is cognizable by a revenue court, the suit would be cognizable by the revenue court only.

The fact that the ancillary reliefs claimed are cognizable by civil court, would be immaterial for determining the proper forum for the suit :

(b) the main relief is cognizable by the civil court, the suit would be cognizable by the civil court only, and the ancillary reliefs which can be granted by the revenue court, may also be granted by the civil court.

(g) **Relief which the plaintiff claims.**—The nature of a *suit for redemption* of security in India is laid down in Section 60 of the Transfer of Property Act. The principal clause of this section recognises the right of a mortgagor—

(i) on payment or tender, at a proper time and place, of the mortgage money,

(ii) to require the mortgagee—

(a) to deliver to the mortgagor the mortgage deed and all documents relating to the mortgaged property which are in possession or power of the mortgagee ;

(b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor ; and

(c) at the cost of the mortgagor either—

1. to re-transfer the mortgaged property to him or to such third person as he may direct, or

2. to execute and (where the mortgage has been effected by a registered instrument to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished.

A subsequent clause in this section is to the effect that —

1. the right conferred by this section is called a *right to redeem* and

2. a suit to enforce it is called a *suit for redemption.*

A suit for redemption is thus defined by this section as a suit for enforcement of a right to redeem, and that right to redeem consists of the *three reliefs* which the mortgagor is entitled to under clauses a), (b) and (c) mentioned above, on payment or tender, at a proper time and place, of the mortgage money.

Consequently, a suit can be said to be a suit for redemption if the *three rights* enumerated in this section as constituting the right to redeem are *claimed in the suit.*

It may even be possible to hold a suit to be suit for redemption if even one of those three rights is claimed in the suit.

This law in India is based primarily on the law prevailing in England, and the nature of suit for redemption in England has been held to be very similar. Reference may be made to *Halsbury's Laws of England*, 3rd Edition Vol. 27, paragraph 834 at page 424, which shows :—

"The common form order for redemption directs an account of what is due to the mortgagee under, and by virtue of the mortgage, and for his taxed costs of the redemption action, and directs that, upon the mortgagor paying to the mortgagee the amount certified to be due within 6 months after the date of the master's certificate, at a time and place to be appointed by such certificate, the mortgagee shall.

(a) surrender or give a statutory receipt, and

(b) deliver up the title deeds ;

and it further directs that, if the mortgagor makes default in such payment, his action is to stand dismissed with costs.

If one of two mortgagees has disappeared, the costs of detaining a vesting order to get his interest must be borne, in the absence of misconduct by the other mortgagee, by the mortgagor.

If the mortgagee has been in possession, the order directs, as against the mortgagee, on account of the rents and profits of the mortgaged property on the footing of wilful default ; and if the mortgagor alleges that nothing is due on the mortgage, a direction is added for surrender within 21 days after the date of certificate, if, on taking the accounts, it appears that nothing is in fact due."

Section 17 of the Mysore Money-lenders Act No. 13 of 1939 confines itself to laying down the maximum of arrears of *interest* to be allowed up to the date of the decree and is not concerned with the interest that is to be allowed for the period thereafter. As the Code of Civil Procedure is applicable, interest subsequent to the date of the decree has to be awarded in accordance with Order 34, Rule 11, C. P. C.

Under Rule 11 (a) (i), interest is payable on the principal amount found or declared due on the mortgage, from the date of the decree up to the date fixed for payment, at the rate payable on the principle, or, where no such rate is fixed, at such rate as the Court may deem reasonable.

(i) **Statement of the value of subject-matter of the suit for the purposes of jurisdiction and payment of Court-fees**.—Clause (i) of Rule 1 of Order VII states that the plaint shall contain a statement of the value of the subject-matter of the suit for the purpose of jurisdiction and of Court-fees, so far as the case admits.

The plaintiff must separately give in his plaint the valuation of claim for the purposes of court-fee and of jurisdiction, though both may be stated in one paragraph.

The candidates in the Examinations are not required to put in the figures of Court-fee payable for a certain suit.

Valuation of a claim for the purpose of jurisdiction is required in order to determine whether the suit is within the pecuniary jurisdiction of the court, and also further, for determining the forum of appeal. There are some suits the subject-matter of which does not admit of satisfactory valuation, for instance, a suit for restitution of conjugal rights. It has been held by the Calcutta, Bombay and Allahabad High Courts that a plaintiff is entitled to put his own valuation on such suits. Such valuation must, of necessity, be arbitrary but it *prima facie* determines the jurisdiction of the court, though a defendant may take an objection of under-valuation, or over-valuation, in which case the question will have to be decided by the court.

Payment of court-fees in regard to plaints.—Articles 1 to 7 of the First Schedule of the Bombay Court-fees Act, 1959, indicate the Court-fees to be paid in regard to plaints referred to therein. It means that a plaint is a document which requires payment of Court-fees as shown in that Schedule I of the Bombay Court-fees Act. It means that it is chargeable to Court-fees. Such a document, therefore, cannot be filed, exhibited or recorded in any Court of Justice in view of the provisions of the Court-fees Act.

(2) **In money suits.**—Where the plaintiff seeks the recovery of money, the plaint shall state the precise amount claimed.

But where the plaintiff sues for—

(a) mesne profits, or

(b) an amount which will be found due to him on taking. unsettled accounts between him and the defendant.

the plaint shall state approximately the amount sued for. (O. 7, R. 2).

(3) **Subject-matter of suit being immovable property.**—Where the subject-matter of the suit is immovable property,—

(a) the plaint shall contain a description of the property sufficient to identify it ; and

(b) in case such property can be identified by boundaries or numbers in a record of settlement of survey, the plaint shall specify such boundaries or numbers. (O. 7, R. 3).

(4) **When plaintiff sues as representative.**—Where the plaintiff sues in a representative character, the plaint shall show not only that he has an actual existing interest in the subject-matter, but that he has taken the steps (if any) necessary to enable him to institute a suit concerning it. (O. 7, R. 4).

This rule deals with *representative suits* (i. e., suits in a representative character).

The *description of party in a representative suit* may be as follows :—

"A. B., son of....., aged.....years, resident of.....Lucknow, on behalf of himself and all other creditors of C. D. late of (add description and residence)."

Where a suit is brought in a representative character *e. g.*, as a *Karta* of joint Hindu family, this fact should be mentioned in paragraph one of the plaint.

(5) **Defendant's interest and liability.**—The plaint shall show that—

(a) the defendant is, or claims to be, interested in the subject-matter ; and

(b) he is liable to be called upon to answer the plaintiff's demand. (O. 7, R. 5).

(6) **Grounds or exemption from limitation law.**—Where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaint shall show the ground upon which exemption from such law is claimed. (O. 7, R. 6).

It is not necessary to mention in every plaint in a suit that the suit is within the period of limitation prescribed by the law of limitation, except where the suit is *prima facie* barred by limitation and there are some facts on the basis of which the plaintiff claims that the suit is within limitation.

For example, where the day on which limitation expires is a holiday and the suit is filed on the next working day, the plaintiff may state this fact in the plaint.

(7) **Relief.**—Every plaint shall state specifically the relief which the plaintiff claims either simply or in the alternative.

It is not necessary to ask for general or other relief which may always be given as the Court may think just to the same extent as if it had been asked for.

The same rule applies to any relief claimed by the defendant in his written statement. (O. 7, R. 7).

Under Order 7, Rule 1 (g), the plaint shall contain the relief which the plaintiff claims.

A plaintiff might claim one or more reliefs, either simply or in the alternative, but whatever reliefs he claims must be stated in the plaint specifically. Reliefs sought in the plaint cannot be supplemented by an oral prayer. The Court cannot also allow a man more than what he himself claims. The court must however, mould the relief according to the facts proved which are not inconsistent with the pleadings. The plaintiff omitting a relief will have to make an application for amendment which cannot be allowed after limitation. Each relief should be clearly and separately stated and two or more reliefs should not be mixed together.

Under Order 2, rule 2, if a plaintiff can claim more than one relief on the same cause of action, he must claim all, otherwise he shall not be entitled to bring a new suit for the omitted relief unless the omission in the first suit was with the leave of the court. The only exception is in respect of a mortgage suit where a suit for sale may be brought later though the previous suit was for personal decree only under Order 34, rule 14.

In cases where the court is called upon to give a relief different from that claimed by the plaintiff, the test is to see whether the defendant is not taken by surprise and there can be no surprise if the relief granted is consistent with that claimed or is less than claimed by the plaintiff. "The court should always be ready to do all it can to do justice and should give the right relief to which a plaintiff is entitled, as possible." Thus when necessary facts are stated in a plaint which if established entitle the plaintiff in law to obtain certain relief, it is open to the court to grant him such reliefs although the relief specially asked for may be inartistically framed. Similarly when a relief is claimed on a specific ground, the court may grant it on a different ground if the latter is disclosed by the plaint allegations or by evidence in the case.

In a case where the plaintiff merely claimed a money decree and did not pray for sale of the property charged, the right to sell was given on the charge being proved. A suit for possession was alliwed to be converted into a suit for redemption. A plaintiff suing for possession may be given a decree for joint possession. But the fact that the court can give the right relief should be no excuse for a pleader for not being careful in claiming the right

relief, for the mistake may at least deprive his client of the cost of the suit. It is his duty to claim the relief to which he is entitled on the facts, and if he is entitled to several reliefs in the alternative, he can claim those reliefs alternatively.

The prayer should be for necessary and effectual relief only and no relief should be sought, which is not necessary or the grant of which will be implied in the grant of the other and main relief prayed for. There is a general practice to claim a relief in some such form, "Any other relief to which the plaintiff may be found to be entitled". This practice is not commendable for the reason that it is within the inherent right of the court to give such relief as it may think just to the same extent as if it had been asked for. The practice of beginning every paragraph of tne plaint with the word "that" may also be given up as the word "that" is useless.

In *Nagubai Ammal* v. *Shamo Rao*, A. I. R. 1956 S. C. 593 : 1956 S. C. R. 451, it was held that evidence let in on one issue on which the parties went to trial, should not be made the foundation for the decision of another and different matter which was not present to the minds of the parties and on which they had no opportunity of adducing direct evidence. In *Venkatarama Devaru* v. *State of Mysore*, A. I. R. 1958 S. C. 255 : 1958 S. C. R. 895, it was held that relief should not be granted on a new plea, on a new point not taken in the pleading nor any issues raised, but merely upon the admissions of the party. It was observed in this Supreme Court case :

"The object of requiring a party to put forward his pleas in the pleadings is to enable the opposite party to controvert them and to adduce evidence in support of his case. And it would be neither legal nor just to refer to evidence adduced with reference to a matter which was actually in issue and, on the basis of that evidence, to come to a finding on a matter which was not in issue, and decide the rights of parties on the basis of that finding."

It has to be recognised that a party cannot be awarded relief on a basis not pleaded by him and on which there is no issue, merely taking advantage of some statements in the pleadings or in the evidence made or given for a different purpose and with reference to a different issue. Such deviation from the pleading is permissible very rarely and only in exceptional circumstances, if it can be postulated that the other side has unambiguously and unequivocally admitted completely the factual or the legal basis on which relief could be moulded. In other words, it is the clear admission of the opposite party in the pleadings that confers jurisdiction upon the Court to award relief on a basis different from one covered by the issue on which parties went to trial.

Where the plaintiff seeks relief in respect of several distinct claims or causes of action founded upon separate and distinct grounds, they shall be stated, as far as may be, separately and distinctly. (O. 7. R. 8).

Annexures to the plaint.—The plaintiff shall endorse on the plaint, or annex thereto, a list of documents (if any) which he has produced along with it. (O. 7. R. 9 (1)).

The Chief Ministerial Officer of the Court shall sign such list. (O. 7, R. 9 (4)).

Where a plaintiff sues upon a document in his possession or power, he shall—

(a) produce it in Court when the plaint is presented ; and

(b) at the same time, deliver the document or a copy thereof to be filed with the plaint.

Where he relies on any other documents (whether in his possession or power or not) as evidence in support of his claim, he shall enter such documents in a list to be added or annexed to the plaint. (O. 7. R. 14).

Where any such document is not in th possession or power of the plaintiff, he shall, if possible, state in whose possession or power it is, (O. 7, R. 15).

Where—

(a) the *suit* is *founded upon a negotiable instrument*, and

(b) it is proved that the instrument is *lost*, and

(c) an indemnity is given by the plaintiff, to the satisfaction of the Court, against the claims of any other person upon such instrument,

the Court may pass such decree as it would have passed if the plaintiff had—

(a) produced the instrument in Court when the plaint was presented, and

(b) at the same time, delivered a copy of the instrument to be filed with the plaint. (O. 7. R. 16).

Save in so far as is otherwise provided by the Banker's Books Evidence Act, XVIII of 1891, *where the document on which the plaintiff sues is an entry* in a shop-book or other account in his possession or power, the plaintiff shall produce the book or account at the time of filing the plaint, together with a copy of the entry on which he relies.

The Court, or such officer as it appoints in this behalf, shall—

(a) forthwith mark the document for the purpose of identification;

(b) after examining and comparing the copy with the original and finding it correct, certify it to be correct ;

(c) return the book to the plaintiff ; and

(d) cause the copy to be filed. (O. 7, R. 17).

Consequence of non-production of document at the time of filing plaint.—A document which ought to be—

(a) produced in Court by the plaintiff when the plaint is presented; or

(b) entered in the list to be added or annexed to the plaint, and which is not produced or entered accordingly,

shall not, without the leave of the Court be received in evidence on his behalf at the hearing of the suit.

But this rule does not apply to documents—

(a) produced for cross-examination of the defendant's witness ; or

(b) in answer to any case set up by the defendant ; or

(c) handed to a witness merely to refresh his memory. (O. 7, R. 18).

Presentation of copies of plaint.—If the plaint is admitted the plaintiff shall present as many copies on plain paper of the plaint as there are defendants, unless the Court—

(a) by reason of the length of the plaint ; or

(b) by reason of the number of the defendants ; or

(c) for any other sufficient reason,

permits him to present a like number of *concise statements* of the nature of the claim made, or of the relief claimed in the suit, in which case he shall present such statements. (O. 7, R. 9 (1)).

Where the plaintiff sues, or the defendant or any of the defendants is sued, *in a representative capacity*, such statements shall show in what capacity the plaintiff or defendant sues or is sued. (O. 7. R. 9 (2)).

The plaintiff may, by leave of Court, amend such statements so as to make them correspond with the plaint. [O. 7, (R. 9 (3)]

The chief ministerial officer of the Court shall sign such copies or statements if, on examination, he finds them to be correct. (O. 7, R. 9 (4)

Return of plaint :—The plaint shall, at any stage of the suit, be returned to be presented to the Court in which the suit should have been instituted.

On returning a plaint, the Judge shall endorse thereon—

(a) the date of its presentation and return ;

(b) the name of the party presenting it ; and

(c) a brief statement of the reasons for returning it. (O. 7, R. 10)

The plaint may also be returned for amendment under order 6, Rule. 11.

A plaint was originally presented in the wrong court of Munsif. It was found on a preliminary enquiry that the plaint claim was under valued with a view to bring it within the jurisdiction of the Munsif's court. The plaint was accordingly returned. From that order, the plaintiff appealed to the District Judge who dismissed the appeal and pointed out that the plaint can be re-presented after deleting the prayer for recovery of possession, thereby bringing it within the jurisdiction of the Munsif's Court. After this, the prayer for recovery of the building, was deleted and the plaint was re-presented in the self-same Munsif's Court.

The question arises whether the plaintiff can get the court fee paid on the first occasion, credited, so that he may pay only the balance, if any, on the plaint as presented on the second occasion.

The position is well covered by authorities. One of the earliest decisions is the Full Bench decision of the Madras High Court in *Visveswara Sarma v. T. K. Nair*, [1911] I. L. R. 35 Mad. 567 (F. B.) : 21 M. L. J. 533, where the

court, after receiving the plaint and cancelling the stamp, returned it for presentation to the proper court under order 7, Rule 10, C. P. C. The Court in which the plaint was represented, was directed by the Full Bench of the Madras High Court to give credit to the fee already levied by the former court. In giving the direction, the Full Bench observed :

"This is the existing practice in this Presidency, and there is nothing in—

(a) the new Code of Civil Procedure, or

(b) the Presidency Small Cause Courts Act, or

(c) the City Civil Court's Act,

to indicate that the legislature intended to interfere with such practice."

In *Bimala Prasad Mukerji v. Lal Moni Devi*, A. I. R. 1926 Cal, 355 (DB) : 30 C. W. N. 90, in the interval between the return of the plaint and its presentation to the proper court, the Court Fees Act was amended. The learned Judges of the High Court held :

"When the plaint which has been returned, is presented in a court of competent jurisdiction, the suit, even for purposes of court-fee, must be taken to be instituted on the date of such re-presentation and therefore, on such plaint, the court fee should be leviable under the law which was in force at the time when the plaint was re-presented. If the Act is amended in the meantime increasing the amount of fee payable thereunder, the plaintiff should be credited with fee originally paid."

The same view was taken in *Sarabhamma v. Veeranna*, A. I. R. 1950 Mad. 57 : (1949) 2 M. L. J. 159, where the learned Judge held that where a court, after receiving a plaint and cancelling the stamp affixed thereto, returns the plaint for presentation to the proper ourt under O. 7, Rule 10, the latter court to which the plaint is presented is bound to give credit for the fee already levied by the former Court. The learned Judge further observed :

"But this applies only to cases in which the same plaint is presented to the court.

Where the plaint as presented to the proper Court is not substantially, if not *verbatim et literatim*, the same and there are substantial changes made in the allegations part, as well as in the causes of action part, no credit can be given for the court fee paid on the original plaint which had been filed in the wrong court."

But this restriction, however, cannot be availed of in a case where the plaint represented does not contain any change much less substantial, either in the allegation part or in the causes of action part, and all that the plaintiff has done on the second occasion is that the prayer for recovery of the building is deleted. Thus the re-presented plaint is not a fresh one in all respects. In the case of this nature, the only order that the court can pass in the ends of justice, is to give credit to the fee paid on the former occasion.

There is no provision in the Court Fees Act for refunding the court-fee paid on a plaint presented in a wrong court. Refund is provided only in cases of compromise or remand of the sui for fresh disposal.

But, according to the Bombay High Court, even a refund of court fee can be ordered in the case of return of the plaint invoking the inherent jurisdiction of the court. Chagla, C. J.. has held in *Anglo French Drug Co. (Eastern, Ltd. v. State of Bombay*, A. I. R. 1951 Bom. 130 : I. L. R. (1951) Bom, 648, that, in the in-

terest of justice, an order for refund of court fees should be made by the court which returns the plaint under O. 7, R. 10 and hence the Bombay city civil Court has jurisdiction under Section 151, C. P. C, to make an order for refund of court fees when it returns a plaint under O. 7, Rule 10.

In *Bhura Mal Dan Dayal v. Imperial Flour Mills Ltd.*, A. I. R. 1959 Punj. 629 : I. L. R. (1959) Punj. 1770, the representation was in a court situated in a different State. The suit was originally instituted in the civil Court at Delhi, but it was held that the Delhi Court had no jurisdiction, with the result that the plaint was returned for being presented to the proper Court. The plaintiff thereupon re-presented the plaint in the Court at Ambala. The court fee stamp affixed on the plaint originally instituted bore the words 'Delhi State' having been purchased at Delhi. The trial Court thought that administration of justice, except where it relates to the Supreme Court and the High Court, is a state subject and therefore, the court fee stamps purchased in Delhi could not be used in the Court in the State of Delhi. On this view, the plaintiff was ordered to make up the deficiency in court fee. It was *held* by the Punjab High Court that—

(a) When a court after receiving a plaint and cancelling the stamp affixed thereto, returns the plaint for presentation to the proper Court under O. 7, rule 10, the latter Court to which the plaint is re-presented, is bound to give credit for the fee already levied by the former Court.

(b) The Court at Ambala was bound to give credit for the fee already paid on the first occasion. The scheme of the Act shows that a litigant is, normally speaking, not made liable to pay court fee twice over for the same adjudication by the same Court or by its successor Court or on account of the mistakes of Courts.

Rejection of plaint.—The plaint shaall be rejected by the Court in the following cases :

(a) Where it does not disclose a cause of action ;

(b) Where the relief claimed is under-valued and the plaintiff, on being required by the Court to correct the valuation within the time fixed by the Court, fails to do so ;

(c) Where the relief claimed is properly valued, but the plaint is written on an insufficiently stamped paper, and the plaintiff, on being required by the Court to supply the requisite stamp paper within a time to be fixed by the Court, fails to do so ;

(d) Where the suit appears from the statement in the plaint to be barred by any law. (O. 7, R. 11)

Order 7, Rule 11 does not apply to an application for permission to sue in 'forma pauperis'. Such an application is specifically dealt with by Order 33, Rule 8 which makes it clear that an application for permission to sue in *forma pauperis* is only deemed to be a plaint in the suit when the application is granted. If the application has never been granted, O. 7, Rule 11 does not apply. *Narsingh Das* v. *Rati Ram*, A. I. R. 1956 Hyd. 41 (D. B.)

Plaint not disclosing cause of action.—Clause (a) of Rule 11 of Order VII of the Code of Civil Procedure provides that the plaint shall be rejected where it does not disclose a cause of action.

This is a mandatory provision of law which goes to the root of the matter, and the Court has on option but to reject the plaint where there is total want of cause of action.

There is a clear distinction between—

(i) a case where the plaint itself does not disclose any cause of action ard

(ii) a case in which, after the parties have produced oral and documentary evidence, the court, on consideration of the entire material on record, comes to the conclusion that there was no cause of action for the suit.

In the latter case, obviously the plaint cannot be rejected under Order 7, Rule 11, (a).

Therefore, where—

(a) on the face of the plaint, it cannot be said that it does not disclose any cause of action ; and

(b) it is after the entire evidence has been led and the documents produced in the case considered that the trial court comes to the conclusion that, in point of fact and law, it has not been proved that the tenant has committed any default in payment of the arrears of rent within the statutory period, so as to expose him to the penalty of eviction from the accommodation on the ground of his alleged default in payment of rent after the receipt of the notice of demand,

it is a case where it is ultimately proved that there was no cause of action for the suit for ejectment.

A plaintiff whose plaint has been ordered to be returned for presentation to proper court after a finding given by the court in which the suit was instituted holding that on the valuation arrived at by the court the suit did not lie within its pecuniary jurisdiction, is neither legally competent nor can be permitted to file the same plaint either in the same court or in another court of a coordinate jurisdiction without any material change in regard to the subject-matter on the property or properties in respect of which relief for possession had been claimed. I am also equally of the opinion that even if a plaintiff sought to do so, the court in which the plaint is sought to be filed for the second time will have no jurisdiction to entertain the same and to register it as a suit because the very act of doing so necessarily would involve over-riding the decision previously given by a court exercising equal jurisdiction Whether in such a case Sec. 11, C. P. C. or the wider principle of *res judicata* will or will not apply is not really a matter on which the question can be or should be decided. The real question is whether permitting such a thing to be done would necessarily involve conflict in the exercise of jurisdiction by courts having equal powers. In my opinion, the answer to this question can only be in the affirmative, i. e., it would necessarily involve a clear conflict of jurisdiction of two courts having identical powers. Such a thing certainly cannot be permitted,

Under Order 7, Rule 11, C. P. C. itself, a clear provision has been made for rejection of the plaint in case where the relief claimed is undervalued and the plaintiff on being required by the court to correct the valuation within a period fixed by the court fails to do so. In my opinion, whenever the court in which a suit is instituted, holds that the suit is undervalued either for purposes of jurisdiction or for payment of court-fee, the court should require the plaintiff to amend the plaint so as to make the

necessary corrections in regard to valuation on the basis of the finding given by the court within the time fixed by it. If the plaintiff refuses to do so the court would be entitled to reject the plaint. If, however, the plaintiff makes the necessary corrections, the plaint so amended must be ordered to be returned for presentation to the proper court, if on the amended valuation the court ceases to have pecuniary jurisdiction over the suit.

Insufficient court-fee.—As provided under clause (c) of Rule 11 of Order 7 of the Code of Civil Procedure, if the plaint be properly valued but it is insufficiently stamped and if the plaintiff fails to supply the requisite court-fee within the time fixed by the court, the plaint must be rejected.

It is well settled, however, that the court has ample power under section 148 of the Code to enlarge the time for the payment of deficit court-fee. Section 148, C. P. C. lays down that where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this code, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

Court-fee payable on memorandum of appeal against order rejecting plaint.—In the Full Bench case of *Apparao Sheshrao* v. *Mt. Bhagubai* A. I. R. 1949 Nag. 1 (F. B.) I. L. R. (1948) Nag. 565, the plaint was rejected under Order 7, Rule 11 (c). It was *held* that—

(a) Under Article 1 of Schedule I of the Court-fees Act, the court-fee must always be ad valorem on the subject-matter in dispute unless it is incapable of valuation.

In other words the court-fee has always to be ad valorem unless, for the special reasons given in Article 17 of Schedule I, the appeal can be brought on fixed fee.

(b) It is well known that the Court-fees Act is a fiscal measure and, like all fiscal measures, must be strictly construed.

(c) Article 1 of Schedule I of the Court-fees Act. itself requires that attention should be paid to the subject-matter of the dispute. The subject-matter in dispute, in so far as the appellant is concerned, is the extra court-fee demanded of him by the court. The whole of the claim which he prefers in the court below is never dismissed when the plaint is rejected. This is clear from the definition of 'decree' given in section 2 (2) of the Civil Procedure Code read with Order, 7, Rule 13 of the code.

(d) For the purposes of the Civil Procedure Code, the rejection of a plaint is deemed to be a decree because the definition given in section 2 includes the rejection of a plaint, but that does not mean that the rejection of a plaint is a conclusive determination of the rights of the parties. Under Order 7, Rule 13, the aggrieved party can file another plaint on the same cause of action after paying the court-fee demanded. This shows that there is no conclusive determination of the rights of the parties when the rejection of the plaint takes place.

(e) After the rejection of the plaint, the unsuccessful plaintiff has two courses open to him :

(i) He can accept the decision of the trial court and present a fresh plaint ; or

(ii) he can appeal against the order which amounts to a decree.

In the second case, the dispute involves only the demand for the extra court-fee and with the other alternative open to him, it is not right to say that the dispute covers the entire controversy in the suit about which no decision has really taken place.

(f) The court-fee is payable on the memorandum of appeal under Article 1 of Schedule I ad valorem on the value of the subject-matter of appeal and in this particular case, the value of the subject-matter of appeal is the difference between the court-fee paid in the lower court and the court-fee demanded there.

In the case of an appeal against an order rejecting a plaint either under Rule 11 (a) or (d) of Order 7, C. P. C., what has to be valued is the subject-matter involved and not the abstract question of law raised for consideration in appeal. So, in a given suit, if a preliminary issue relating to limitation is tried and the suit is dismissed as barred by time, then, on the memorandum of appeal against the decree passed in the suit, the court-fee should not be paid only in regard to that question of limitation. Similar considerations arise if a suit is dismissed as disclosing no cause of action or barred by any law. The subject-matter of appeal is not different even in the case of appeals against rejection of plaints under Rule 11 (a) and (d) of Order 7 on these grounds because the real relief involved in either case is the same, namely, reversal of the decree or order or rejection of plaint having the effect of a decree and remand of the suit for trial on merits for the purpose of granting the reliefs claimed in the plaint. Therefore, the court-fee payable on the memorandum of appeal against the order rejecting the plaint under Rule 11 (d) is governed by Article 1 of Schedule I of the Court-fees Act, and it must be ad valorem on the subject-matter in dispute in appeal which is the same as that in the court of first instance. (*M. G. Tipnis* v. *The Secretary, Ministry of Commerce, Union of India*, A. I. R. 1970 M. P. 5 (D. B.) : 1969 M. P. L. J. 639 : 1969 M. P. W. R. 633 : 1969 Jab. L. J. 922).

Where a plaint is rejected, the Judge shall record an order to that effect with the reasons for such order. (O. 7, R. 12).

The rejection of the plaint on any of the grounds does not, of its own force, preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action. (O. 7, R. 13).

But the fresh plaint must be filed within the prescribed period of time, that is, the fresh suit must not be barred by the law of limitation.

Taking plaint off the file.—(1) Where a suit is instituted by or on behalf of a minor without a next friend, the defendant may apply to have the plaint taken off the file, with the costs to be paid by the pleader or other person by whom it was presented.

(2) Notice of such application shall be given to such person, and the Court, after hearing his objections (if any), may make such order in the matter as it thinks fit. (O. 32, R. 2).

Amendment of plaint.—Where defendant added.—Where a defendant is added,—

(a) the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary ; and

(b) amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendant. (O. 1, R. 10 (4)).

CHAPTER VII

WRITTEN STATEMENT

Written statement.—*Written statement* is the name given to pleading filed by the defendant in answer to the plaint filed by the plaintiff. It is an exposition of the case in writing as made out by the defendant or the parties. As a matter of practice, the defendant files the written statement in every suit except where he does not seriously contest the suit, though legally it is not necessary for him to do so. Omission to do so does not amount to admission of the claim of the plaintiff. Under Order VIII, Rule 1, the defendant may, and if so required by the Court, shall, at or before the first hearing or within such time as the Court may permit present a written statement of his defence. So the Court may call upon him either by an order passed at the time he appears to contest the suit or at any subsequent stage, to file a written statement of his *defence* within the time allowed by the court.

This is a mandatory provision of law which goes to the root of the matter and the Court has no option but to reject the plaint where there is total want of cause of action.

It is true that usually a court does not adjourn a case or a hearing on which the written statement is to be filed to another day for the same purpose without a *request* in that behalf being made by the defendant, but this cannot be adopted as an invariable rule. (*Gian Chand* v. *Tirath Ram Gupta*, A. I. R. 1973 Punj. & Har 210 (S. J.)=74 Punj. L. R. 171=1972 Cur. L. J. 58).

It is not safe to hold that the adjournment was given in pursuance of a request made by the defendant when the order granting the adjournment does not mention any such request. (*ibid*).

It was *held* by the Patna High Court that—

1. In a suit where issues have to be determined, it is clear from the provisions of Rule 1 of Order 14 that the first hearing of the suit takes place when the court proceeds to frame and record the issues. At the same time, it is clear from Rule 1 of Order 14 that the court is not required to frame and record issues where at the first hearing of the suit the defendant makes no defence.

2. The right of the defendants to file a written statement before the first hearing can only be exercised until the date which is fixed for the first time for the final hearing of the suit, and does not extend beyond that stage up to the adjourned date of the hearing which, in the terms of Order 17, Rule 1, is really a date for the further hearing of the suit. (*Bihar State Electricity Board* v. *M/S New Gobindpur Coal Co, Private Ltd.* A. I. R. 1973 Pat. 191).

It is optional with the defendant to file a written statement unless he is expressly required to do so under Order VIII, Rule 1. The Court may also in its discretion call upon the plaintiff to file a written statement in

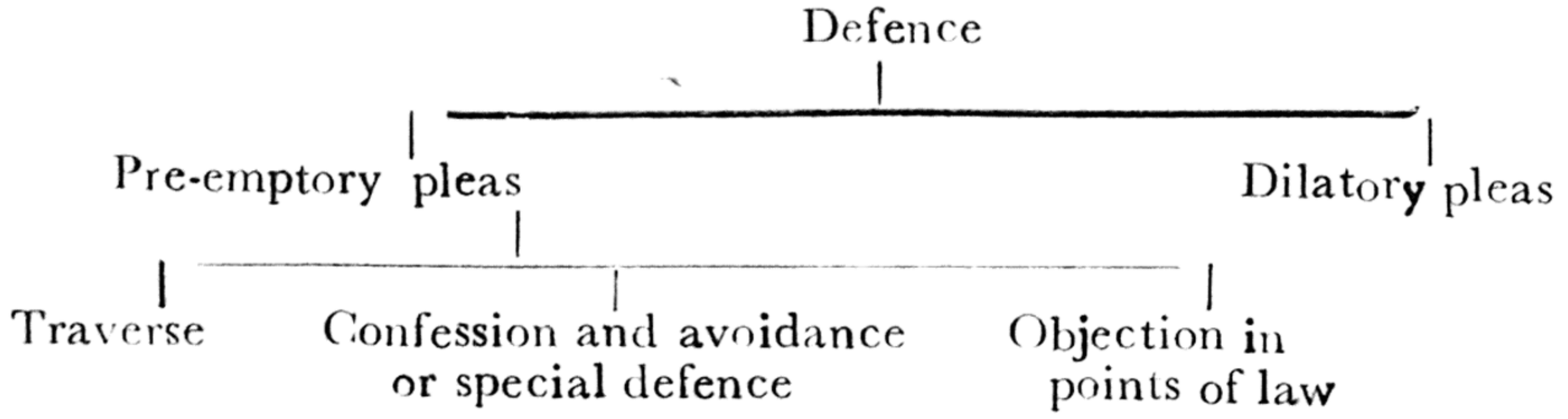
answer to the pleas of the defendant or call upon the defendant to file an additional written statement in answer to the claim of plaintiff. (Vide Order 8. Rule 9). Such subsequent pleading of the plaintiff is called a written statement of the plaintiff or a "Replication" and that of the defendant is called an additional written statement.

Rule 10 of Order VIII, Civil Procedure Code, lays down that where any party from whom a written statement is so required, fails to present the same within the time fixed by the Court, the Court may pronounce judgment against him or make such order in relation to the suit as it thinks fit.

The written statement can be divided into two portions : The first portion is called the formal portion of the written statement, which contains the same heading and the title of the suit as the plaint. Where there are several plaintiffs or more than one defendant, the name of the first one only need be written and that may be followed by the word "another" or "and others." The number of the suit should be mentioned below the name of the Court which is given on the top.

The second portion called the substantial portion of the written statement begins with the expression "written statement on behalf of defendant A. B." after the formal portion. The rules regarding signature and verification of the written statement are the same as in respect of the plaint.

Defence in a suit may, as a general rule, be understood as follows



The written statement should begin with the admission and denial of material facts alleged in the plaint. Each fact should be taken up in the same order in which it is alleged in the plaint and it should either be admitted or denied, or when defendant has no knowledge of it, he may simply refuse to admit it. The admission and denial should be of all material facts in the plaint. The words "not admitted" and "denied" are not to be lightly used. When a fact is such that it must be within the defendant's knowledge, it must be either admitted or denied. For instance, if the plaintiff alleges that the defendant beat him, the defendant should say that he denies to have beaten the plaintiff. When the defendant has no knowledge of the fact, he should say that he does not admit it.

The *object of a written statement* is to find out the real points in dispute between the parties, and thus to prevent fabrication of false evidence, or the unnecessary production of evidence.

Rules for drafting written statement.—The following points should be kept in mind by the defendant while framing his written statement,—

(1) **Pleading of new facts.**—The defendant must raise by his pleading—

(a) all matters which show that the suit is not maintainable ;
(b) that the transaction is either void or voidable in point of law ; and,
(c) all such grounds of defence as, if not raised, would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the plaint, as, for instance,—

(i) fraud ;
(ii) limitation ;
(iii) release ;
(iv) payment ;
(v) performance ; or,
(vi) facts showing illegality. (O. 8, R. 2).

The pleading of these new facts is known in English law as *confession and avoidance.*" The defendant for the purpose of such a plea confesses or admits the facts alleged by the plaintiff and seeks to avoid or nullifies the legal effect by alleging other facts which would constitute a defence even if the plaintiff were to succeed in establishing all his allegations.

In an Allahabad case, the suit was fiied the Mahant Y of Daraganj Udasin Sangat against the defendant, a Mahant M of another Amritsar Udasin Sangat for recovery of possession of the Sangat properties. The question for consideration has whether, in spite of the fact that—

(a) the deed of relinquishment has been found to be not binding on the plaintiff, and
(b) it has been found to be one which is liable to be cancelled and set aside,

no decree for possession be passed in favaur of the plaintiff as, according to the defendant, the plaintiff has forfeited the right to the office of Mahant on account of—

(a) his having become *patit* by marriage,
(b) his having committed breach of trust by denying the existence of the trust itself,
(c) the fact that he has alienated and transferred some of the trust properties,
(d) the fact that he is guilty of negligence in the performance of his duties as Mahant, and
(e) the fact that he is placed under police surveillance.

The plaintiff urged that the defendant had failed to establish the charges brought by him against the plaintiff.

The Allahabad High Court *held* that—

(i) The plea raised by the defendant is one of confession and avoidance.
(ii) It is, undoubtedly, open to a defendant to raise special defence by raising plea in confession and avoidance.

For instance, in a suit on the basis of a contract, it is open to the defendant to admit the contract and the contractual liability and to avoid the effect of that admission by raising the plea of frustration or performance. In that case, it will always be for the defendant to affirmatively establish that the

contract had either been frustrated or performed. If the defendant succeeds in doing that, he would certainly be entitled to relief for the obtaining of which such a plea was raised.

(iii) The Court is bound to consider such a plea of avoidance provided the court is competent to go into the question on which that plea is based in that particular proceeding.

(iv) In case, a consideration of that plea necessitates going into question which the particular court is not competent to go into in that proceeding, the court must refuse to entertain that plea or to enquire into those pleas.

(v) So far as the instant case is concerned, this is not a suit under section 92 of the Code of Civil Procedure.

According to that provision, the questions whether—

(a) a particular trust is a public or a private trust ; or

(b) the trustee or Mahant is guilty of misconduct and breach of trust ; or

(c) the Mahant has forfeited right to the office on account of misconduct and breach of trust,

are all questions which have to be gone into in a properly constituted suit under section 92, C. P. C.,

(vi) The question, however, is whether a special defence raised in the suit which—

(a) is not a suit under section 92, C. P. C., and

(b) requires the court to enter into an enquiry of questions which are covered by the provisions of section 92, C. P. C.

can be entertained and enquired into.

We are of the opinion that the principle underlying section 92, C.P.C., is equally applicable to defence also, because—

(a) There does not appear to be any rational basis for holding the view that a defence by which a defendant seeks for obtain such relief as can be granted to a plaintiff only in a suit under section 92, should not be equally barred in a suit which is not a suit under section 92.

(b) when a plea in confession and avoidance is raised by the defendant, his position is analogous to the position of a plaintiff, particularly in relation to the plea of avoidance.

It is for the defendant, in such a case, to establish the correctness of the plea, and it is only when that is done that he would be entitled to the relief which he seeks by raising that defence.

(vii) The relief that the defendant seeks in the instant case by raising that defence, is that his possession over the trust and its properties be maintained, but is not open to the court to enter into an enquiry of questions which are required to be gone into in a suit under section 92, C. P. C.

(viii) After having arrived at the finding that the deed of relinquishment is liable to be set aside and cancelled, the court cannot refuse a decree for possession to the plaintiff nor can it enquire

into the correctness of the charges of misconduct and breach of trust brought forth by the defendant against the plaintiff. (*Mahant Manadeo* v. *Mahant Yaduvansh Deo Gopinath*, A. I. R. 1969 All. 571 (D.B) ; 1968 A. L. J. 1079).

Pre-emptory pleas.— Pre-emptory pleas are those pleas which go to the root of the case.

A defendant is said to take the *plea of traverse* when he totally and categori cally denies the plaint allegations.

If, in the case of a suit on a bond, the defendant denies the execution of the bond outright, he will be said to have taken the plea of traverse.

The following allegations in the plaint need not be traversed :—

(i) *The matters of law or of inferences of law.*

But if such allegation of law is not admitted, the defendant may take an objection in point of law.

(ii) *Damages.*

The defendant need not plead to the claim or amount of damages alleged in the plaint, whether the damages claimed are general or special. He may, however, plead that the damages claimed are too remote or not sufficient to give a cause of action to the plaintiff. But he may plead to facts in aggravation of damages.

A defendant is said to take the *plea of confession and avoidance* when he admits the plaint allegations but seeks to destroy their effect by alleging affirmatively certain facts of his own.

In a suit on a bond, if the defendant admits the execution of the bond but pleads payment, he is said to have taken the plea of confession and avoidance.

A plea of the defendant that the plaint does not disclose any cause of action or that it is bad under some provision of law is called an *objection in point of law* or a plea of "demurrer".

If, in a suit upon a bond, the defendant pleads that the plaint does not show the consideration of the bond and thus it does not disclose any cause of action, he will be said to be relying on objection in point of law.

All these pleas go to the root of the case and may be taken together or in the alternative.

Dilatory pleas.—Dilatory pleas are those pleas which do not go to the root of the suit but which nevertheless delay the quick disposal of the suit.

The following are the *instances* of dilatory pleas :—

(i) A plea of the defendant that the suit is liable to be stayed under Section 10 of the Code of Civil Procedure ;

(ii) A plea of the defendant that the suit is bad for misjoinder of causes of action ;

(iii) A plea of the defendant that the suit is bad for misjoinder of parties .

Pleas not taken.—In his written statement, the defendant does not raise the question that no valid religious endowment was created under the Will executed by the testator B and relied upon by the plaintiff. The defendant attacks the will only on the ground that it had not been executed by B and, if it had been so executed, B was not in a sound disposing mind. The defendant merely denies due execution and attestation of the will in accordance with law and contends that it was invalid and unenforceable for this reason. The defendant takes up an alternative case that even if the will is

held to be genuine and valid, the right to trusteeship and management of the property did not vest in the plaintiff but in the defendant. Consequently, the defendant cannot raise the argument at the subsequent stage that the will did not have the effect of creating the valid endowment.

(2) **Denial.—1. Specific.**—It is not sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff ;

but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages. (O. 8, R. 3).

The proposition that the denial should be specific and not evasive, has been laid down in Rules 3 and 4 of Order VIII, C. P. C.

The denial of the defendant in his Written Statement may be in the following forms :—

(i) The defendant denies that (set out the facts).

(ii) The defendant does not admit that (set out the facts).

(iii) The defendant admits that (set out the fact or facts) but says that (set out the facts).

(iv) The defendant denies that he is a partner in the defendant firm of.....

(v) The defendant denies that he made the contract alleged or any contract with the plaintiff.

(vi) The defendant denies that he contracted with the plaintiff as alleged or at all.

(vii) The defendant admits assets but not the plaintiff's claim.

(viii) The defendant denies that the plaintiff sold to him the goods mentioned in the plaint or any of them.

Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be *taken to be admitted* except as against a person under disability.

But the Court may, in its discretion, require any fact so admitted to be proved otherwise than by such admission. (O. 8, R. 5).

So, if the defendant does not specifically deny any particular allegation in the plaint, he will be taken to have admitted it.

It is clear from the wording of Rule 5 of Order VIII of the Code of Civil Procedure that it is only intended to apply to a case where pleadings have been put in by the defendant, and this rule is not intended to apply to a case where the defendant has not put in a written statement. It is only if there is a written statement filed by a party that the question of denial, specifically or by necessary implication, of an allegation would arise. (*Narinder Singh* v. *C. M. King*, A. I. R. 1928 Lah. 769 (D. B.) : 10 Lah. L. J. 339 ; *Bhageran Rai* v. *Bhagwan Singh*, A. I. R. 1962 Pat. 319 : 1962 B. L. J. R. 549 ; *Gopinath* v. *Sayed Pathru*, A. I. R. 1953 Hyd. 166 : I. L. R. (1951) Hyd. 838 ; *M/s. Hardyal Chaman Lal* v. *The Union of India*, A. I. R, 1969 Punj. & Har. 329 : (1969) 71 Punj. L. R. 198 : 1969 Cur. L. J. 84). The contrary view has been:

taken in *Shriram Surajmal* v. *Shriram Jhunjhunwalla*, A. I. R. 1936 Bom. 285. 38 Bom. L. R. 577 and *Vinayak Sheedhar Kulkarni* v. *Chintaman Vaman Kulkarni*, A. I. R. 1938 Bom. 470 : 40 Bom. L. R. 972, where it was held that the defendant, having failed to put in a written statement, would be deemed to have admitled all the allegations in the plaint.

Where the asserti n of the plaintiff in the plaint is that Gopinath was the adopted son of Dasrathi and the defendant No. 8 in his written statement unambiguously accepts such position, it stands as a strong piece of admission of the defendant No. 8 in the pleading itself and is binding on him.

Where Exhibit 3 is a previous statement of the defendant No. 3 who has not come to the witness box, it may be argued that Exh. 3 is not admissible as the defendant No. 3 has not been examined in the present case and he has not been cross-examined as to the previous statement made by him. Section 145 of the Evidence Act says that a witness may be cross-examined as to the previous statement made by him in writing without such writing being shown to him, but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him. Therefore, if defendant No. 3 himself is a party and has not been examined as a witness, section 145 cannot be invoked, and, as he is a party to the suit, his statement can be proved as an admission against him. This position has been clearly stated in a Full Bench decision in *Firm Malik Das Raj Faqir Chand* v. *Firm Piara Lal Aya Ram*, A. I. R. 1946 Lah. 65 (F. B.) : 47 Punj. L. R. 391, where it was observed:

"A party's previous admission is relevant under section 21 and can be used as evidence against him if that party has not appeared in the witness box at all.

The value of that admission as a piece of evidence depends on the circumstances of each case, but, ordinarily, an admission is a valuable piece of evidence".

Therefore, Exhibit 3 is admissible and relevant as against defendant No. 3 without he being confronted with under section 145.

But the question remains as to how far the admissions of the defendants Nos. 3 and 8 would be binding on defendant No. 5.

The general rule is that an admission can only be given in evidence against the party making it and not against any other party. In general, the statement of defence made by one defendant cannot be read in evidence either for or against his co-defendant, the reason being as there is no issue between the defendants, no opportunity for cross-examination is afforded, and, if this course is allowed, the plaintiff can make one of his friends a defendant and thus gain a most unfair adventure. But this rule has no application to cases where the co-defendants have joint interest. It is not by virtue of a person's relationship to the litigation that the admission of one can be used against the other. It must be because of some privity of title or of obligation. This principle is deducible from section 18 (1) of the Evidence Act which runs as follows :

"Statements made by persons who—

(a) have any proprietary or pecuniary interest in the subject-matter of the proceeding ; and

(b) make the statement in their character of persons so interested,

are admissions, if they are made during the continuance of the interest of the persons making the statement.

So if the adoption of Gopinath by Dasarathi is not accepted, then the shares of defendants nos. 3 and 8 would substantially increase along with defendant no. 5. So defendants nos. 3, 5 and 8 are jointly interested in the subject-matter of the suit, and the admissions of defendant nos. 3 and 8 are receivable not only against them but also against defendant no. 5 and the admissions relate to the subject-matter of dispute and are made by defendants 3 and 8 in their character of persons jointly interested with defendant 5 against whom the evidence is tendered.

This principle of law has been admirably elucidated by Sir Ashutosh Mukherji in the case of *Mea Jan* v. *Alimuddin Mea*, A. I. R. 1917 Cal. 487 : I. L. R. 44 Cal. 130, as follows :—

"In my opinion, the contention that an admission by one defendant is not receivable in evidence as against another defendant is too broadly formulated."

The same eminent Judge had observed in *Akbar Ali* v. *Lutfe Ali*, A. I. R. 1918 Cal. 971 : I. L. R. 45 Cal. 159, as follows :—

"The distinction is based upon obvious good sense. The admission of one co-plaintiff or co-defendant is not receivable against another, merely by virtue of his position as a co-party in the litigation. If the rule were otherwise, it would, in practice, permit a litigant to discredit an opponent's claim merely by joining any person as the opponent's co-party and then employing that person's statement as admissions. Consequently, it is not by virtue of the person's relation to the litigation that the admission of one can be used against the other ; it must be because of some privity of title or of obligation."

2. **Evasive.**—Where a defendant denies an allegation of fact in the plaint, he must not do so evasively, but answer the point of substance.

Thus, if it is alleged that he received a certain sum of money, it is not sufficient to deny that he received that particular amount, but he must—

(a) deny that he received that sum or any part thereof, or

(b) else set out how much he received.

If an allegation is made with diverse circumstances, it is not sufficient to deny it along with these circumstances. (O. 8, R. 4).

A denial is evasive when it is—

(a) not clear or precise ; or

(b) susceptible of more than one meaning.

Therefore every allegation, the truth of which is desired to be denied, should be taken up separately and categorically and denied in the written statement. It is not the proper mode of denial to plead that the defendant does not admit the allegation in a particular para "as alleged" or that "he admits a portion of the para" and denies that the proper mode is to take a particular allegation. The defendant should deny it in specific terms and plead the other

facts that the defendant may wish to plead together with it. The defendant must answer the point of substance and must not be too literal. For instance, if the plaintiff claims any sum of money from the defendant and the latter pleads payment, it is not sufficient to state that "the defendant has paid all the money that was due to the plaintiff". He should, on the other hand, specify the amount paid, the dates on which the payment was made and the person to whom it was made. It the defendant wishes to deny the receipts of such money, the denial should be as follows :

"I deny that I received Rs. 500 or at all" or "I deny that I was at Allahabad on 20-3-41 or at any other time." When a compound allegation, consisting of several distinct facts, is made in the plaint, and it is intended to deny each of such facts, a single denial of the whole allegation will not be specific, but the defendant should break up the allegations into separate parts and deny each of them separately. For instance, if the plaintiff alleges tha t"the defendant took possession of the plaintiff's house", and the defendant means to deny both the allegations of having taken possession of the plaintiff's house and that the house belongs to the plaintiff, he should plead in the separate sentences as follows :—

1. The defendant denies that the house belongs to the plaintiff.

2. The defendant denies that he took possession of the plaintiff's house.

A traverse merely contradicts and compels the plaintiff to prove the fact; a special defence justifies or excuses, and the burden of proof of these facts lies on the defendant. It is open to the defendant to take both these defences together. It is the duty of the defendant to allege the particulars of defence with sufficient clarity. *Usually such defences consist of*—

(a) the bar of limitation ;
(b) the bar of jurisdiction ;
(c) the plea of accord and satisfaction ;
(d) the plea of insolvency ;
(e) the plea of minority ;
(f) the plea of remission ;
(g) the plea of rescission ;
(h) the plea of payment ;
(i) the plea of estoppel ;
(j) the plea of *res judicata* ;
(k) the plea of acquiescence ; etc.

(a) **Bar of limitation.**—It is not sufficient to plead that a suit is barred under a particuar Article of the Limitation Act. On the contrary, the facts which make a particular Article applicable to the facts of the case should be alleged.

The defendant may allege in his Written Statement that the suit is barred by Article.....of the Schedule to the Limitation Act.

(b) **Bar of jurisdiction.**—The expression 'jurisdiction' is used in different senses.

In the sense of inherent jurisdiction, it is a virtue of the Court andis not dependent on the consent or dissent of parties, and its lack would make orders and decisions ultra vires and null and void and, therefore, challengeable even in collateral proceedings.

On the other hand, in the sense of pecuniary jurisdiction or territorial jurisdiction which sets the limits of exercise of the powers of a court, it is waivable by the parties, and such waiver *will* be presumed conclusively under section 21, C. P. C. and Section 11 of the Suits Valuation Act if objection is not taken before settlement of issues for trial and its want would make the decision, at the worst, only voidable in an appeal but unchallengeable in collateral proceedings.

Mr. Justice Mukherjee, Acting Chief Justice, speaking for the Full Ben h of the Calcutta High Court in *Hirday Nath Roy v. Ramchandra Barua Sarma*, A.I. R. 1921 Cal. 34 (F. B.) at page 36 : I. L. R. 48 Cal. 138 at page 146, explained what exactly is meant by jurisdiction, in the following words :—

"In the order of Reference to a Full Bench in the case of *Sukhlal v. Tara Chand*, I. L. R. (1905) 33 Cal. 68 (F. B.) it was stated that jurisdiction may be defined to be the power of a Court—

(a) to hear and determine a cause ; or

(b) to adjudicate and exercise any judicial power in relation to it.

In other words by jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision.

An examination of the cases in the books discloses numerous attmpts to define the term 'jurisdiction' which has been stated to be—

(a) the power to hear and determine issues of law and fact;

(b) the authority by which the judicial officers take cognizance of, and decide, causes,

(c) the authority to hear and decide a legal controversy ;

(d) the power to hear and determine the subject matter in controversy between the parties to a suit and to adjudicate or exercise any judicial power over them ;

(e) the power to hear, determine and pronounce judgment on the issues before the court ;

(f) the power or authority which is conferred upon a court by the Legislature to hear and determine causes between parties and to carry the judgments into effect ;

(g) the power to enquire into the facts, to apply the law, to pronounce the judgment and to carry it into execution.

This jurisdiction of the Court may be qualified or restricted by a variety of circumstances. Thus, the jurisdiction may have to be considered with reference to place, value and nature of the subject matter.

The power of a tribunal may be exercised within defined territorial limits. Its cognizance may be restricted to subject matters of prescribed value. It may be competent to deal with controversies of a specified character, for instance testamentary or matrimonial causes, acquisition of lands for public purposes, record of rights as between landlords and tenants.

This classification into—

(a) territorial jurisdiction,

(b) pecuniary jurisdiction, and

(c) jurisdiction of the subject-matter, is obviously of a fundamental character.

Given such jurisdiction, we must be careful to distinguish *exercise of jurisdiction* from *existence of jurisdiction*, for, fundamentally, different are the consequences of failure to comply with statutory requirements in the assumption and in the exercise of jurisdiction.

The authority to decide a cause at all, not the decision rendered therein, is what makes up jurisdiction, and when there is jurisdiction of the person and subject-matter, the decision of all other questions arising in the case is but an exercise of that jurisdiction.

The extent to which the conditions essential for creating and raising the jurisdiction of a Court or the restraints attaching to the mode of exercise of that jurisdiction, should be included in the conception of jurisdiction itself, is sometimes a question of great nicety.

We must not thus overlook the cardinal position that in order that jurisdiction may be exercised, there must be a case legally before the Court and a hearing as well as a determination.

A judgment pronounced by a Court without jurisdiction is void, subject to the well-known reservation that, when the jurisdiction of a court is challenged, the Court is competent to determine the question of jurisdiction, though the result of the enquiry may be that it has no jurisdiction to deal with the matter brought before it.

If a Court has jurisdiction to try a suit and has authority to pass orders of a particular kind, the fact that it has passed an order which it should not have made in the circumstances of the litigation, does not indicate total want or loss of jurisdiction so as to render the order a nullity."

It is well settled that in order to determine the question as to which court would have jurisdiction to decide the suit, the court has to look into the allegations made in the plaint and not in the written statement. (*Munshi Ram* v. *Beli*, A. I. R. 1970 J. & K. 2 (D. B.) : 1969 Kash. L. J. 106).

It is settled law that the exclusion of the jurisdiction of the civil courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. (*ibid*).

Where a suit is brought for two or more reliefs, one of which is cognizable by the civil court but the others are not, then the jurisdiction of the civil court is not ousted. (*ibid*).

Defence of jurisdiction.—The defendant in his written statement may allege that the court has no jurisdiction to hear the suit on the ground that (set forth the grounds).

Objection to jurisdiction.—No *objection as to the place of suing* shall be allowed by any appellate or revisional court unless—

(a) such objection was taken in the court of first instance—

(i) at the earliest possible opportunity ; and

(ii) in all cases where issues are settled, at or before such settlement ; and

(b) there has been a consequent failure of justice. (Section 21 of the Code of Civil Procedure).

The assumption of jurisdiction by the District Judge, even if he did not possess it, does not result in a failure of justice if the objection to jurisdiction was raised very late. (*Abdul Azeem* v. *Fahimunnisa Begam*, A. I. R. 1969 Mys. 226 (D. B.) : (1967) 1 Mys. L. J. 575 : 10 Law. Rep. 412).

(c) **Plea of accord and satisfaction.**—The plea of accord and satisfaction may be broken in the following two parts :—

(i) agreement to accept a particular article or work in lieu of the obligation due ; and

(ii) the giving of that article or doing of the work in pursuance of that agreement.

A contract may be discharged by accord and satisfaction.

Discharge of contract by accord and satisfaction.—Accord and satisfaction is the purchase of a release from an obligation, whether arising under contract or tort, by means of any valuable co sideration not being the actual performance of the obligation itself. The *accord* is the agreement by which the obligation is discharged. The *satisfaction* is the consideration which makes the agreement operative. This is English law as to Accord and Satisfaction.

Example.—A owes B Rs. 300. A and B agree that if A offers Rs. 200, B will accept them in full satisfaction of his debt. B offers Rs. 200.

The payment is the discharge of the whole debt or the whole claim. The agreement to pay Rs. 200 is the *accord* while the actual payment of Rs. 200 is the *satisfaction.*

Accepting any other satisfaction than the performance originally agreed is called in English law *accord and satisfaction.* Thus if A owes B Rs. 5,000 and B accepts Rs 1000 from C in discharge of this claim against A, A is completely discharged from his old liability. Similar is the case with an adjustment of account between two parties. The agreement to accept full satisfaction is called *accord* and the actual carrying out of the new agreement is called *satisfaction. Accord* without satisfaction is no discharge of the contract. (*British Russian Gazette* v. *Associated Newspapers*, (1933) 2 K.B. 616).

Section 63 of the Indian Contract Act makes a wide departure from the English law inasmuch as it does not refer to any agreement and valuable consideration. Section 63 cannot be, therefore, enlarged by the implication of English doctrine. (*New Standard Bank Ltd.* v. *Probodh Chandra*, (1942) 198 I. C. 768).

(cc) **Plea of insolvency.**—The defendant in his written statement may allege that—

(i) "The defendant has been adjudged an insolvent."

(ii) "The plaintiff, before the institution of the suit, was adjudged an insolvent and the right to sue vested in the receiver."

(ccc) **Plea of minority.—Who are competent to contract.**—Every person is competent to contract who is of the age of majority according to the law to which he is subject and who is of sound mind, and is not disqualified from contracting by any law to which he is subject. (Section 11 of the Indian Contract Act).

One of the essentials of a valid contract is that the parties must be competent to contract, that is, they must be competent to bind themselves by a promise.

Minor's contract.—Section 10 lays down that the contracting parties should be competent to contract. Section 11 expressly provides that a person who has not attained the age of majority according to the law to which he is subject, is incompetent to enter into a contract. The question arose as to the nature of a contract entered into by a minor. It was formerly held by the various High Courts, following the English law, that a minor's contract was only voidable at his option and not void. But in 1903 the Privy Council ruled in the leading case of *Mohori Bibi* v. *Dharma Das Ghose*, (1903) 30 Cal. 539 (P. C.) that the Indian Contract Act makes it essential that all contracting parties should be competent to contract and specially provides that a person who, by reason of infancy, is incompetent to contract, cannot make a contract within the meaning of the Act. Therefore the Privy Council held that a contract entered into with a minor is wholly void and not voidable.

Privy Council case :—Mohori Bibi v. Dharmodas Ghose. Facts.—Dharmodas Ghose executed a mortgage in favour of Brahmo Dutt to secure the repayment of Rs. 20,000 at 12 p. c. on some houses belonging to him on the 20*th July*, 1895. Then Dharmodas Ghose was a minor. Throughout the transaction, Brahmo Dutt was absent and he was represented by his agent Kedar Nath. Kedar Nath during the course of negotiation came to know that Dharmo Das was a minor.

On the day on which the mortgage was executed, Kedar Nath got a declaration, which was prepared by him, signed by Dharmo Das with the content that Dharmo Das came of age on *17th June*, 1895.

On 10th September, 1895, the minor, by his mother and guardian as next friend, brought the suit against Brahmo Dutt on the ground of his minority at the time of execution of the mortgage and praying for a declaration that it was void and inoperative.

The Privy Council *held* as follows :—

(1) A mortgage executed by a minor cannot be enforced against him.

(2) With regard to the argument that the plaintiff was estopped by section 115 of the Indian Evidence Act from taking the plea that he was a minor at the time of the execution of the mortgage deed, the Privy Council held that the section does not apply to such a case, where the statement relied upon is made to a person who knows real facts and is not misled by the untrue statement. There can be no estoppel where the truth of the matter is known to both the parties.

The knowledge of Kedar Nath, the agent, must be imputed to the principal Brahmo Dutt.

(3) Regarding the agreement that the court ought not to have decreed in the respondent's favour without ordering him to repay the money under secs. 64 and 65 of the Contract Act, the Privy Council held that sections 64 and 65 are inapplicable, firstly, because section 64 refers to a voidable contract whereas, in view of sections 10 and 11, a minor's contract is not voidable but void and secondly section 65 has no application because the section presupposes the existence of a contract whereas there can be no contract with a minor. A contract with a minor is void *ab initio*.

(4) As to the contention that '*he who seeks equity must do equity*' and should refund the money on equitable grounds, their Lordships held that a Court of equity cannot compel a person to pay any amount in respect of a transaction which as against that person the legislature has declared to be void.

(5) As regards Sections 38 and 41 of the repealed Specific Relief Act, 1877 (corresponding to sections 30 and 33 (1) of the Specific Relief Act, 1963) their Lordships held that the relief provided therein is purely discretionary.

In short, the decision of the Privy Council is to this effect that a contract entered into with a minor is not voidable but absolutely void and the infant is under no obligation to repay the money that he received under the contract ; in other words, he cannot be compelled to fulfil his obligation arising out of the contract.

This proposition, if strictly interpreted, would lead to startling result ; for there are many contracts which are made in favour of the minor, for example, in the case of a mortgage executed in favour of a minor who had already advanced the mortgage money, the transaction would be void and unenforceable according to this interpretation. So, instead of guarding the interest of the minors, the law would do them much injustice. But the courts in India have, as a rule, confined the Privy Council ruling only to cases where a minor is charged with obligation and the other contracting party seeks to enforce that obligation against the minor. So, no such difficulties have arisen. A minor may, however, take advantage under a contract or enforce contract which is for his benefits. It has been held by a Full Bench of the Madras High Court in *Raghavachariar* v. *Srinivas*, (1917) 40 Mad. 308 (F. B.), that a mortgage executed in favour of a minor who has advanced the whole of the mortgage money is enforceable by him or by any other person on his behalf. A minor purchaser of immovable property was held entitled to recover possession of the property purchased from his vendor. [*Collector of Meerut* v. *Hardian*, A. I. R. 1945 Allahabad 156].

On the same principle, it has been held by the High Courts of Rangoon and Madras, that a promissory note executed in favour of a minor is not void and can be enforced.

Thus, the Courts have spread a special cloak of protection round the minor.

Example.—A, an infant, hired a mare from B to ride for an hour and injured her by riding the same for nearly 4 hours.

As the minor's contract is void, B has no remedy against A, even though A's act was wrongfully done in performance of the contract.

A minor cannot enter into a valid contract but minority does not affect marriage, dower, divorce and adoption.

Fraudulent representation and refund of benefit by minor.— Where an infant has obtained an advantage by falsely stating himself to be of age, equity required him to restore his illgotten gains or to release the party deceived from obligations or acts in law induced by the fraud, but scrupulously stopped short of enforcing against him a contractual obligation entered into while he was an infant, even by means of fraud. Restitution stopped where repayment began. Where the minor has in his possession the very thing that he obtained by fraudulent misrepresentation, equity would compel him to give back that thing ; if he has the identical coins or notes obtained by fraudulently misrepresenting himself as being of age, he may be compelled to give up those coins or notes but to hold him liable for their equivalent where he has spent the money, or where the identical money cannot be discovered would be enforcing a void contract of loan—it would be compelling not restitution but repayment. Similarly, in cases of goods sold to a minor on his false representation may be got restored if he has the identical goods in his possession but where they have been consumed or exchanged or cannot be found, their equivalent in goods or money cannot be ordered to be returned, for that would amount to payment of their price. Thus in English Law when any misrepresentation has been made by the minor and he has taken advantage of that representation then, what at the most can be granted is the restitution and nothing more.

The *doctrine "Restitution stops where repayment begins"* has been held applicable in India in many cases, as for example, *Ajudhia Prasad* v. *Chandan Lal*, 1937 *Allahabad* 610, *F. B.* ; *Tikki Lal* v. *Komal Chand*, *1940 Nagpur 327*. But as stated in *Mohori Bibi case* in appropriate cases the courts in this country are empowered to order restitution by minors on equitable grounds. Having regard to the current of authority in India, it may be said that where a minor sues as plaintiff and makes a fraudulent misrepresentation and induces an innocent person to enter into a transaction, otherwise legal and validly enforceable, the minor can be compelled to restore the benefit received. (*Appaswami* v. *Narayan*, 54 M. 112). Thus we come to the conclusion that the Indian Contract Act contemplates payment of compensation and not mere restitution, the scope is much wider than under the English Law where only restitution can be granted and no more.

According to section 65 of the Indian Contract Act, a person who has obtained some benefit under a void contract must return that benefit when the contract is discovered to be void or becomes void. In *Mohori Bibi's case*, the question arose whether the minor was bound to return the benefit obtained under any contract made by him. Their Lordships observed that Section 65 was confined to those cases where the contract was discovered to be void or becomes void. It has no application to a case where the contract is void *ab initio* as in the case of a minor's contract. Section 64 like Section 65 starts from the basis of there being an agreement or contract between two competent parties and has no application to a case in which there never was and never could have been any contract. The clear rule laid down is that neither Section 64 nor Section 65 deals with a case where a party is incompetent to enter into a contract at all and that in such a case, therefore, there would be no question of ordering him to restore the advantage which he has received or to make compensation for what he has received. So, a minor is not bound to refund the consideration to a purchaser or lender even if he is guilty of fraudulent representation as to his age.

Their Lordships in *Mohori Bibi's* case, however, added that Sections 39 and 41 of the repealed Specific Relief Act, 1877 (corresponding to Sections 31 and 33 (1) of the Specific Relief Act, 1963) give discretion to a Court to require a party in whose favour concellation of a deed is adjudged to make compensation to the other party. This observation of their Lordships has been regarded as an authority that under certain circumstances the Court may on adjudging cancellation of a deed at the instance of a minor require a minor to make compensation to the other party. So, in some cases, the courts have held that where a mortgage of minor's property is set aside by the Court, the Court may direct the minor to refund consideration to the lender if the loan was obtained by the minor by fraudulently representing that he was of full age. It has similarly been held that where a sale of minor's property is set aside by the Court, the Court may if satisfied that the sale was procured by the minor by a fraudulent representation as to his age, require the minor to make compensation to the purchaser. (*Mohd. Hamidan Bibi* v. *Nanhe Main*, 1933 *Allahabad* 372). But it has been held that such discretion should not be exercised in favour of a person who has been unscrupulous in his dealings with the minor and has deliberately undertaken the risk. (*Mohori Bibi* v. *Dharmo and Das Ghose* and *Mohd. Syed* v. *Bishambharnath*, 45 Allahabad 644).

It must, however, be carefully remembered that Section 41 of the old Specific Relief Act corresponding to Section 33 (1) of the Specific Relief Act, 1963, has no application to a case where a suit is brought against an infant and there is no question of the cancellation of an instrument. Section 41 of the old Act applied only when the minor is the plaintiff and that Section is based on the well known principle that *he who seeks equity must do equity*. In numerous cases it has been held that Sections 64 and 65 of the Indian Contract Act do not apply nor do Sections 39 and 41 of the old Specific Relief Act apply to a case where the suit is brought against a defendant minor on a document executed by him although he had misrepresented his age to the plaintiff. The latest case on the point is *Ajudhya Prasad* alias *Nanhe Babu* v. *Chandan Lal*, 1937 A. L. J. 680 (F. B.). In that case, money was berrowed by two minors under a mortgage-deed at a time when they were minors under a fraudulent concealment of the fact that executant were minors and subsequently the mortgagee brought a suit to enforce the mortgage against the debators. It has been *held* :

1. That the defendants being minors at the date of the execution of the mortgage-deed were incompetent to enter into any contract of mortgage and the mortgage-deed was void *ab initio* and could not be enforced against the defendants.

2. That no question of equity arises in a case where the mortgagee himself is suing for the recovery of the mortgage debt.

3. That where one of the parties is a minor and is incapable of contracting so that there never is and can never be a contract, Section 65, Contract Act, can have no application to such a case as that section starts from the basis of there being an agreement or contract between competent parties.

4. That the contract itself being void, the plea of estoppel against the minors must fail.

English law as to minor's contracts.—Minor's contracts were classified into the following three classes at Common Law :—

(1) Those for necessaries.

(2) Those for the benefit of the minor ; and

(3) Other contracts.

The first two classes of the minor's contracts were valid and the third one was voidable at the option of the minor.

The law was affected by the Infant's Relief Act, 1874 which rendered void all the contracts of the minor except those for necessaries.

After this Act of 1874, contracts made during infancy cannot be enforced, though ratified, if there was no fresh consideration for ratification of the liability by the minor. A man of full age cannot make himself liable upon a contract entered into during infancy, even though there is fresh consideration for his ratification of such liability. An infant on attaining majority can sue on a contract entered into during infancy, though he may not be sued thereon. But he can only claim damages, for there can be no specific performance for want of mutuality in the contract.

Resemblance between Indian and English law as to minor's contracts.—Regarding minor's contracts, the Indian Law resembles with the English law on the following points :—

(1) Both in India and England, a minor must pay for necessaries of life supplied to him (Section 68).

(2) In both the countries, a minor is not personally liable for money obtained on fraudulent representation.

Distinction between Indian and English law as to minor's contracts.—The Indian law differs from the English law on the subject of minor's contracts on the following points :—

(1) In India, the minor's contract is altogether void but in England it is sometimes void and sometimes voidable. In England, the loan of money to the minor is void.

(2) In India, a minor can ratify a fresh consideration of a contract entered into during minority whereas in England he cannot do so. (*Kundan Bibi* v. *Sree Narayan*, (1906) 11 C.W. N. 195).

(3) In India, a minor on attaining majority can neither sue nor be sued on contracts entered into by him during minority but in England he can sue on the contract for damages.

(4) In India, a minor's property is liable for the necessaries and not his person but in England the minor is personally liable.

(5) In India there can be no specific performance by or against the minor unless it is a contract entered into by a guardian on behalf of the minor and the minor's benefit. In England there can be no specific performance for want of mutuality in the contract.

Ratification of minor's contract.—As regards *ratification of minor's contract*, a minor's contract is void and has no existence in the eye of law and therefore it cannot be ratified and cannot support a fresh promise by the infant after attaining majority. In other words, since a minor's agreement is void, there is no question of ratification, and the consideration of the past agreement entered into during minority cannot be a good consideration for the contract ratified on attaining majority.

Example.—A promissory note executed by a person on attaining majority in settlement of an earlier promissory note executed by him during minority in consideration of a sum of money received by him when a minor, is not enforceable for want of consideration. (*Suraj Narain* v. *Sukhu Ahir*, 1928 All. 44 (F. B.)).

But where a minor on attaining majority executed a mortgage bond in favour of a creditor in consideration of advances received by him during his minority and also a fresh advance made at the time of the mortgage, the mortgage is enforceable only to the extent of the fresh advance because the minor's contract being void is incapable of ratification by him on attaining majority.

But it is competent for a person emerging from a state of disability to take up and carry on the transaction commenced while he remained under disability in such a way as to bind himself as to the whole. (*Magan Lal* v. *Ramman Lal*, 45 Bom. L. R. 761).

Example.—A minor during his minority incurred a debt which he pays on attaining majority.

Since an agreement with minor is void and not unlawful, the sum paid cannot be sued for subsequently and in law it must be regarded on the same footing as a gift.

Estoppel against minor.—Section 115 of the Indian Evidence Act deals with the *estoppel*. When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act on such belief, neither he nor his representative, shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing.

A minor's contract is void ; and he is not liable on contract or for any wrong arising out of or immediately connected with a contract ; and, therefore, to say that he was bound by estoppel, would be doing indirectly what could not be done directly owing to his incapacity to contract. So, it was held that an infant was not estopped from pleading his minority ; if a person sued him on a contract which the minor had induced by a fraudulent misrepresentation as to his age. This was the opinion of all the High Courts except that of Bombay.

The question as to whether a minor can be estopped by a false representation as to his age is now finally settled by *Sadiq Ali Khan v. Jai Kishori.*

The Privy Council held in *Sadiq Ali Khan* v. *Jai Kishori*, (1928) 30 Bom. L. R. 1342 (P. C.). that a mortgage-deed executed by a minor is not binding and incapable of founding a plea of estoppel. A minor cannot be estopped by a false representation because there can be no estoppel against the statute. The English law on the subject is also the same. [*Leslie* v. *Sheill* (1914) 30 K. B. 607].

Problem.—A, a minor, obtains a loan of Rs. 5,000 from B, a money-lender, by fraudulently representing that he is of full age.

In India, minor's contract is absolutely void, and if B brings a suit for the recovery of the amount, even though the minor had fradulently represented himself as of full age, his suit must fail. (*Marha Rao* v. *Seth Chowgmal, etc. Co.*, 1934 Mad. 560). The minor is not estopped from setting up the plea of minority.

It has been held in various cases that estoppel cannot be pleaded against him. Therefore, even the misrepresentation of the minor does not render the contract valid.

Same is the law in England. Any contract of debt contracted by a minor will be void under the Infants' Relief Act, 1874, though it will be voidable under the Contract Act.

English case.—Leslie v. Sheill (1914) 3 K. B. 607.—The defendant minor induced the plaintiff to lend him £400 by falsely representing that he was of full age. The plaintiff filed a suit against the defendant for the recovery of the money on the ground of fraud and in the alternative, of "for money had and received."

It was held that under the Infants' Relief Act, the contract was absolutely void and granting the relief would amount to enforcing a void contract indirectly. Hence the suit was dismissed.

Specific performance of minor's contract.—Since the minor's contract is wholly void, the question of specific performance of such a contract does not arise. Even the contracts entered into by the guardian of the minor on behalf of the minor cannot be specifically performed by or against the minor.

But agreements in favour of a minor are perfectly valid. In other words, agreements which are beneficial to the minor are valid. The only difficulty is that the minor cannot claim specific performance of an agreement because specific performance, being an equitable remedy, can be granted only when there is mutuality, i. e., when each party is entitled to the remedy.

A contract may be entered into on behalf of a minor by his guardian or by the manager of his estate. In such a case, the contract can be specifically enforced by or against the minor in the following circumstances:--

(1) The contract is such that the guardian or manager is competent to enter into such contract on behalf of the minor so as to bind the minor, and

(2) The contract is for the benefit of the minor.

If either of these two conditions is wanting, the contract cannot be specifically enforced at all.

It has been held that a contract entered into by a competent guardian of a minor for the sale of property belonging to the minor, the contract being for the minor's benefit, may be enforced by either party to the contract.

But it has been held by the Privy Council in *Mir Sarwarjan v. Fakhruddin*, (1912) 39 Cal. 232 (P. C.) that a guardian of a minor has no power to bind the minor by a contract for the purchase of immovable property, and the minor is not entitled to specific performance of the contract as there is no mutuality.

In subsequent case *Babu Ram v. Saidulnisa*, 35 All. 499, the Privy Council held that the Privy Council ruling given in *Mir Sarwarjan v. Fakhruddin* is confined only to those cases where a contract has been entered into by a guardian on behalf of a minor and the guardian is not appointed under the Guardians and Wards Act. But if a guardian is appointed under the Guardians and Wards Act a contract by him on behalf of the minor for the purchase of immovable property is valid.

So the case of a certified guardian of a minor selling the minor's property with the sanction of the court stands on different footing, and specific performance of such a contract can be orderd if the contract was benefical to the minor.

Infant's (minor's) liability for Torts.—Though as a rule an infant is not liable on a contract, he is always liable for a tort. In the words of Lord Mansfield, "the protection of infancy must be used as a shield and not as a sword." An infant or a minor is generally no less liable than an adult in tort, but it must be carefully remembered that *when a tort arises out of a contract and the contract is not enforceable against the infant, he cannot be made liable by treating the breach of contract as a tort unless it can be severed from the contract.* It is well established that an infant cannot be made liable for what was in truth a breach of contract by framing the action *ex delicto* (in tort). You cannot convert a contract into a tort to enable you to sue an infant. Lord Kenyon, C. J., observed in *Jenning v. Rundell*, 3 T. R. 335 that if it were in the power of a plaintiff to convert that which arises out of contract into a tort, there would be an end of that protection which the law affords to infants. Where a contract has been procured by a fraudulent representation made by an infant as to his age, he is liable neither on the contract nor in tort, because tort which sustains an action for damages must be independent of the contract and no person can evade the law conferring immunity upon an infant by converting the contract into a tort for the purpose of charging the infant. When an action is in reality an ection *ex contractu* (in contract) but disguised as an action *ex delicto* (in tort), it cannot be enforced. [*Leslie v. Sheill* (1914) 3 K. B. 607].

In short, a minor cannot be made liable in contract by suing him in tort. But it may well be that his wrongful act is independent of contract, except for the fact that if there had been no contract he would have no opportunity of committing it. In such circumstances, he is liable. Both these rules can be illustrated from the reports in *Jenning v. Rundell*, (1799) 3 T. R. 335. A minor hired a mare for riding and rode it so carelessly that he injured the mare. He could not be held liable upon the contract by framing an action in tort for negligence. But in *Burnard v. Haggis* (1863) 14 C. B. 45, where an infant, under graduate at Cambridge, hired a mare *for riding* on the road and in spite of being expressly told that it was not let for jumping or larking, nevertheless rode it across country and fatally injured it by *jumping* it on a stake. He was held liable. He did an act altogether forbidden by the owner of the mare and outside the purpose of the hiring. It was as much a tort as if he had taken the mare out of a field without any hiring and hunted and killed it. Distinction between acts which are merely an abuse of contract and those which are wrongs in effect independent of it, though admittedly difficult to apply, is a substantial one. If the rule were otherwise, breach of contract and tort overlap in so many instances that an infant's immunity in the law of contract would be seriously diminished.

(cccc) **Plea of remission.**—The defendant in his written statement can allege as follows:—

"The performance of the promise alleged was remitted on (date)."

(c-1) **Plea of rescission.**—The defendant may take the following plea in his written statement :—

"The contract in question was rescinded by agreement between the plaintiff and defendant."

A contract may be discharged by rescission of a voidable contract. Section 64 of the Contract Act deals with such rescission and its effect. It reads as follows :—

"When a person at whose option a contract is voidable, rescinds it, the other party thereto need not perform any promise therein contained in which he is a promisor.

The party rescinding a voidable contract shall, if he has received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received."

Thus when a person at whose option a contract is voidable, rescinds it, the performance of the contract may be avoided by the other party.

Section 64 applies to cases of voidable contracts—contracts voidable *ab initio* (*i. e.* contracts obtained by fraud, misrepresentation etc.) and contracts which become voidable subsequently (*i. e.*, contracts under sections 39, 53, 55 etc.). The section lays down that in case of voidable contracts when the party at whose option a contract is voidable, rescinds a contract, then the other party need not perform his part of the promise. But the party rescinding a voidable contract is required by this section to restore such benefit as he might have received from the other party.

This section does not apply to contracts made by minors or other incompetent persons. The word "person" used in the section means such a person as is competent to contract, *i. e*,, one who is of the age of majority according to the law to which he is subject, and who is of sound mind and is not disqualified from contracting by any law to which he is subject. But sections 38 and 41 of the Specific Relief Act give a discretion to the Court to order a refund of money or award any compensation which justice may require in a case where an infant rescinds a contract under which he has received a benefit.

It is only the benefit received under the contract that has to be returned. Thus if a purchaser of property deposits a sum with the vendor, with power to the latter to forfeit the same if the purchaser fails to complete within the agreed time, the vendor is entitled in law to retain the deposit, on the contract subsequently going off by the purchaser's failure to complete as agreed. (*Natesa* v. *Appavu*, 38 Mad. 178).

(**d**) **Plea of payment**.—If the defendant relies on the *plea of payment*, he must specify the mode in which the payment was made and the time when it was made, *e. g.*, "the defendant pleads a payment of Rs. 400 to the plaintiff on June 5, 1938, towards the bond in suit."

The defendant may allege in his Written Statement that the defendant

(i) as to the whole claim ; or

(ii) as to the part of the money claimed ;

as the case may be,

has paid into Court Rs.....and says that this sum is enough to satisfy the plaintiff's claim or the part aforesaid.

(**e**) **Plea of estoppel**.—It is not sufficient to plead that a particular suit is barred by *estoppel*. The grounds on which this plea is based must be specified. For instance, "the plaintiff is estopped from saying that he is owner of the house in suit because in his conversations with the defendants

on 20-6-37 and on subsequent dates he (the plaintiff) represented that the real owner of the house was A and thereby induced the defendant to enter into the contract for purchase of the said house with A."

The defendant may state in his written statement as follows :—

"The plaintiff is estopped from denying the truth of (insert the statement as to which the estoppel is claimed) because (state the facts relied on as creating the estoppel)."

(f) **Plea of res judicata**.—Section 11 of the Civil Procedure Code provides that no Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties.

The defendant may allege in his Written Statement that the claim of the plaintiff is barred by the decree in the suit (give the number and reference).

Explanation IV to section 11 of the Code of Civil Procedure provides that any matter which might and ought to have been made ground of defence or attack in such former suit, shall be deemed to have been a matter directly and substantially in issue in such suit.

Therefore, if the point about non-creation of a valid religious endowment under a Will relied upon by the plaintiff is a point which might and ought to have been made as a ground of defence by the defendant in the former suit for declaration, the defendant would be barred from raising that plea in the subsequent suit for possession filed by the plaintiff if such plea was not raised by the defendant in the former suit.

In order that section 11, C. P. C., may apply to any particular case, it is necessary that—

(a) The matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit ;

(b) The former suit must have been between the same parties ;

(c) The parties must have been litigating under the same title in the former suit ; and

(d) The matter in issue in the subsequent suit must have been heard and finally decided in the earlier one.

The question whether a matter was raised, heard and finally decided, is one of fact to determined on the circumstances of each particular case, and the *burden* of establishing the plea of res judicata is always on the party who sets it up.

The onus being on the defendant who has set up the plea of res judicata, he should file the plaint as well as the judgment of the earlier suit instead of remaining content only by filing a copy of the written statement and decree. In the absence of proof of the pleadings and judgment in the previous suit, the plea of res judicata cannot be accepted. (Vide *Mst. Rupa* v. *Mst. Sriyabati*, A. I.R. 1955 Orissa 28 : I. L. R. (1954) Cut. 706).

Section 11 of the Code of Civil Procedure prohibits the trial not only of a subsequent suit but also the trial of an issue in the subsequent suit. If the

issue of jurisdiction in the previous civil suit was raised on the pleadings of the parties and was decided, section 11 applies to the retrial of an issue as to jurisdiction in a subsequent suit, and the trial on the question of jurisdiction in the subsequent suit will certainly be precluded by reason of the decision on the question of jurisdiction in the first suit.

In *Mohan Lal* v. *Benoy Kishna*, A. I. R. 1953 S. C. 65 : 1953 S. C. R. 377, Ghulam Hasan, J., of the Supreme Court observed :

"Even an erroneous decision on a question of law operates as res judicata between the parties to it. The correctness or otherwise of a judicial decision has no bearing upon the question whether or not it operates as res judicata.

A decision in the previous execution case between the parties that the matter was not within the competence of the executing Court, even though erroneous, is binding on the parties."

In view of these observations, the decisions on question of jurisdiction operates as res judicata.

It is not necessary, in order that a decree against the manager may operate as res judicata against coparceners who were not parties to the suit, that the plaint or written statement should state in express terms that he is suing as manager or is being sued as a manager. It is sufficient if the manager was in fact suing or being sued as representing the whole family. (See *Lalchand* v. *Sheogobind*, A. I. R. 1929 Pat. 741 : I. L. R. 8 Pat. 788 ; *Ram Kishan* v. *Ganga Ram*, A. I. R. 1931 Lah. 559 : I. L. R. 12 Lah. 428 ; *Prithipal Singh* v. *Rameshwar*, A. I. R. 1927 Oudh 27 : I. L. R. 2 Luck. 288 ; *Surendra Nath* v. *Shambhu Nath*, A. I. R. 1927 Cal. 870 : I. L. R. 55 Cal. 210).

The suit by or against the manager will be deemed to be one brought by him or against him as representing the family if the circumstances of the case show that he is the manager of the family and the property involved in the suit is family property. (See *Mulgund Co-operative Credit Society* v. *Shidlingappa Ishwarappa*, A. I. R. 1941 Bom. 385 : I. L. R. (1941) Bom. 682 ; *Venkatanarayana* v. *Somaraju*, A. I. R. 1937 Mad. 610 (F. B.) : I. L. R. (1937) Mad. 810).

It is not necessary, where the manager is the plaintiff, that the plaint should state in distinct terms that he is suing as manager or, where he is the defendant, that he is being sued as manager. A Karta can represent the family effectively in a proceeding though he is not named as such. (See *Mani Sahoo* v. *Lokanath Mishra*, A. I. R. 1950 Ori. 140 : I. L. R. (1950) Cut. 120).

In *Daryao* v. *State of U. P.*, A. I. R. 1961 S. C. 1457 (1962) 1 S. C. R. 574, before moving the application under Article 32 of the Constitution before the Supreme Court, the petitioners had moved the High Court for a similar writ under Article 226 which was rejected. It was argued that the dismissal of the petition by the High Court under Article 226 created the bar of res-judicata against a similar petition filed in the Supreme Court under Article 32 on the same or similar facts and praying for the same or similar writs. It was *held* by the Supreme Court that—

(a) The rule of res judicata is founded on consideration of public policy, and it is in the interest of the public at large that a finality should attach to the binding decision pronounced by courts of competent jurisdiction, and that individuals should not be vexed twice over with the same kind of litigation.

(b) The rule of res judicata is admissible even in dealing with fundamental rights in petition filed under Article 32.

(c) If the High Court pronounced judgment in a writ petition rejecting the prayer for issue of appropriate writs, such judgment must remain binding between the parties unless it is attacked by adopting the procedure prescribed by the Constitution itself.

(d) The contention that the plea of res judicata cannot be invoked as the earlier decision was the decision of the High Court which was not competent to deal with a petition under Article 32, is liable to be rejected.

The jurisdiction of the High Court in dealing with a writ petition filed under Article 226 is substantially the same as the jurisdiction of the Supreme Court in entertaining an application under Article 32.

(e) The High Court may refuse to issue a writ on either of the two grounds of laches or existence of alternative remedy. But where a citizen moves the Supreme Court under Article 32, the right to move the Court under Article 32 being itself a fundamental right, the Supreme Court ordinarily issues an appropriate writ or order if a fundamental right has been illegally contravened.

But a writ petition before the High Court may be rejected on the ground of laches or the existence of alternative remedy, and, if the High Court refuses to exercise its discretion on the ground of laches or existence of alternative remedy, the decision of the High Court cannot generally be pleaded in support of the bar of res judicata. But if the matter was considered by the High Court on merits and petition was dismissed on such consideration on the ground that—

(i) no fundamental right was proved ; or

(ii) its breach was not established or shown to be constitutionally justified,

there is no reason why such decision should not be treated as a bar against the competence of a subsequent petition filed by the same party on the same fact and for the same relief under Article 32.

(f) If a writ petition is dismissed in limine and an order is pronounced in that behalf, then whether or not the dismissal would constitute a bar would depend upon the nature of the order.

If the petition is dismissed in limine without passing a speaking order, then such dismissal cannot be treated as creating a bar of res judicata. It is true that, *prima facie*, dismissal in limine even without passing a speaking order, in that behalf may strongly suggest that the Court took the view that there was no substance in the petition at all, but, in the absence of a speaking order it would not be easy to decide what factors weighed in the mind of the Court and that makes it difficult and unsafe to hold that such a *summary dismissal* is a dismissal on merits and as such constitutes a bar of res judicata against a similar petition filed under Article 32.

In order that a matter may be said to have been *heard and finally decided*, the decision in the former suit must have been on the merits.

Where the former suit was dismissed by the trial court—

(a) for want of jurisdiction ; or

(b) for default of plaintiff's appearance ; or

(c) on the ground of non-joinder of parties ; or

(d) on the ground of misjoinder of parties or multifariousness ; or

(e) on the ground that the suit was badly framed ; or

(f) on the ground of a technical mistake ; or

(g) for failure on the part of the plaintiff to produce probate or letters of administration or succession certificate when the same is required by law to entitle the plaintiff to a decree ; or

(h) for failure to furnish security for costs ; or

(i) on the ground of improper valuation ; or

(j) for failure to pay additional court-fee on a plaint which was under-valued ; or

(k) for want of cause of action ; or

(l) on the ground that it is premature,

and the dismissal is confirmed in appeal (if any), then the decision, not being on the merits, would not be res judicata in a subsequent suit. (*Sheodan Singh* v. *Daryao Kunwar*, A. I. R. 1966 S. C. 1332 : (1966) 3 S. C. R. 300 : (1966) 2 S. C. J. 768 : (1966) 1 S. C. W. R. 891 : 1966 A. L. J. 578 : 1966 A. W. R. 449).

What the Supreme Court decided in this case was that where a suit has been dismissed otherwise than on merits, then such dismissal will not operate as res judicata in a subsequent suit. What had happened in this Supreme Court case was that four appeals which had been consolidated, were pending in the High Court. Two of these appeals were dismissed by the High Court—one as being time-barred and the other on the ground of failure of the appellant's father to apply for translation and printing of the record as required by the Rules of the High Court. The result of the dismissal of these two appeals was that the decision of the lower Court which was on the merits, remained. The question arose whether the dismissal of these two appeals would result in the remaining two appeals being hit by the principle of res judicata. It was contended that the dismissal of these two appeals was not after consideration on merits. The Supreme Court observed :

"In these circumstances, though the order of the High Court itself may not be on the merits, the decision of the High Court dismissing the appeals is to uphold the decision on the merits as to issue of title and, therefore, it must be held that, by dismissing the appeals, the High Court heard and finally decided the matter, for it confirmed the judgment of the trial court on the issue of title arising between the parties and the decision of the trial court being on the merits the High Court's decision confirming that decision must also be deemed to be on the merits.

It is well settled that where a decree on the merits is appealed from, the decision of the trial court loses its character of finality and what was once res judicata again becomes *res subjudice* and it is the decree of the appeal court which will then be res judicata.

We cannot accept the contention that even though the trial Court may have decided the matter on the merits, there can be no res judicata if the appeal court dismisses the appeal on a preliminary ground without going into

the merits, even though the result of the dismissal of the appeal by the appeal court is confirmation of the decision of the trial court given on the merits.

Therefore, where a decision is given on the merits by the trial Court and the matter is taken in appeal and the appeal is dismissed on some preliminary ground like limitation or default in printing, it must be held that such dismissal when it confirms the decision of the trial court on the merits itself, amounts to the appeal being heard and finally decided on the merits, whatever may be the ground for dismissal of the appeal."

(g) **Plea of acquiescence.**—*Acquiescence* is a branch of the law of estoppel. It arises when a person who is aware of his legal rights and knows that the other person is making a mistake as to those rights, encourages him to spend money or do something else either by directly encouraging him or by abstaining from asserting rights. All these facts should be clearly brought out as indicated in the following illustration given by Mogha—

"The defendant built the house at considerable expenses in the presence of the plaintiff, on vacant land, in the honest belief that it has been allotted to him at the partition, and the plaintiff, while knowing that the said land has been allotted to him, and that the defendant was acting under the said honest belief, did not stop him. He is, therefore, estopped by the principle of "acquiescence" from having it demolished now."

(3) **Particulars of set-off.**—Where, in a suit for the recovery of money,—

(a) the defendant claims to set-off against the plaintiff's demand, any ascertained sum of money legally recoverable by him from the plaintiff, not exceeding the pecuniary limits of jurisdiction of the Court ; and

(b) both parties fill the same character as they fill in the plaintiff's suit,

the defendant may, at the first hearing of the suit, but not afterwards, unless permitted by the Court, present a written statement containing the particulars of the debt sought to be set-off. (O. 8, R. 6 (1)).

This is called *legal set-off.*

A set-off is a counter-demand by the defendant in his written statement in suit for money.

The *conditions* to be fulfilled *for a valid set-off* (for a legal set-off) are the following :—

(a) the suit must be for the recovery of money,

(b) the amount to be claimed as set-off must be—

(i) an *ascertained* sum of money which is legally recoverable ;

(ii) recoverable by the defendant, or by all the defendants of more than one ;

(iii) recoverable by the defendant from the plaintiff or all the plaintiffs if more than one ;

(iv) it must not exceed the pecuniary limits of the jurisdiction of the Court in which the suit is brought ; and

(c) both parties must fill in the defendant's claim to set-off, the same character as they fill in the plaintiff's suit.

'ascertained sum of money'.—1. A sues B on a bill of exchange. B alleges that A has wrongfully neglected to insure B's goods and is liable to him in compensation which he claims to set-off.

The amount, not being ascertained, cannot be set-off. (Illustration (c) to Rule 6 of Order VIII, C. P. C. B cannot set-off his claim, as the amount is not an ascertained, sum of money. The sum sought to be set-off must be a sum ascertained, that is liquidated, and not damages undetermined. It must be something in the nature of a debt but not a claim for contribution of the amount which remains to be determined.

2. Asues B on a bill of exchange for Rs. 500. B holds a judgment against A for Rs. 1,000.

The two claims being both definite, pecuniary demands may be set-off. (Illustration (d) to O. 8, R. 6).

3. A sues B for compensation on account of trespass. B holds a promissory note for Rs. 1, 000 from A and claims to set-off that amount against any sum that A may recover in the suit.

B may do so, for, as soon as A recovers both sums are definite pecuniary demands. (Illustration (e) to Rule 6 of Order VIII)

Pecuniary lim its of jurisdiction.—*Problem*:– A *sues* B *in the Munsif's Court Rs. 500 on a bond.* B *seeks to set-off Rs. 2,200 due to him by* A *upon a bill of exchange*. [The claim for set-off in the above case cannot be allowed because the amount claimed to be set-off (Rs. 2,200) exceeds the pecuniary limits of the jurisdiction of the Munsif, which was Rs. 2,000 only. The nature of the set-off and the amount of it must be within the cognizance of the Court. [*Ram Lal* v. *Lancaster*, 3 All. 114].

Parties filling the same character.—1. A bequeathes Rs. 2,000 to B and appoints C his executor and residuary legatee. B dies and D takes out administration to B's effects. C pays Rs. 1000 as surety for D. Then D sues C for the legacy.

C cannot set-off the debt of Rs. 1000 against the legacy, for neither C nor D fills the same character with respect to the legacy as they fill with respect to the payment of the Rs. 1,000. (Illustration (a) to Rule 6 of Order 8, C. P. C.)

2. A dies intestate and in debt to B. C takes out administration to A's effects and B buys part of the effects from C.

In a suit for the purchase-money by C against B, the latter cannot set-off the debt against the price, for C fills two different characters, one as the vendor to B, in which he sues B, and the other as representative to A. (Illustration (b) to Rule 6 of Order 8).

3. A and B sue C for Rs. 1,000.

C cannot set-off a debt due to him by A alone. Illustration (f) to Rule 6 of O. 8).

4. A sues B and C for Rs. 1,000.

B cannot set-off a debt due to him alone by A. (Illustration (g) to Rule 6 of O. 8).

5. A owes the partnership firm of B and C for Rs. 1,000. B dies, leaving C surviving. A sues C for a debt of Rs. 1,500 due in his separate character.

C may set-off the debt of Rs. 1,000. (Illustration (h) to O. 8, Rule 6).

Cases. —(1) A widow, administering her husband's estate, sued to recover certain movable property wrongfully appropriated by her son. The son was not allowed to set off a claim against his father. [*Manby* v. *Manby*, 14 W. R. 1 6].

(2) Where a receiver sues for the debt due to a person it is open to the defendant to urge the plea of set-off which he could have urged against the creditor himself. Such a claim is allowable although the sum claimed to be set-off is not "legally recoverable" by the defendant from the plaintiff (receiver).

[*Subramanian* v. *Muthuni Swami*, 17 M. L. J. 48].

(3) In a suit by a shareholder for recovery of dividents declared by the Company, it is not open to the directors to claim by way of set-off damages due from the plaintiff in respect of alleged breaches of contract. [47 B. 182].

(4) In a suit for money due on an account, the defendant can claim to set-off the amount of pay due to him by the plaintiff. [41 B. 163].

(5) In a suit to recover wages, the plaintiff alleged that the defendant had engaged him to sell his cloth at a monthly salary. The defendant is entitled to set off the price of cloth which he alleged, the plaintiff had sold on his account on commission. [*Amir Zaman* v. *Nathu Mal*, 8 A. 396].

The rules relating to a written statement by a defendant apply to a written statement in answer to a claim of set-off. (O. 8, R. 6 (3)).

Effect of set-off.—The written statement has the same effect as a *plaint in a cross-suit* so as to enable the court to pronounce a final judgment in respect both of the original claim (of the plaintiff) and of the set-off (claimed by the defendant).

But this does not affect the lien, upon the amount decreed, of any pleader in respect of the costs payable to him under the decree. (O. 8, R. 6 (2)).

Set-off at law and Equitable set-off.—The law recognises two kinds of set-off :—

(i) Statutory or legal set-off ; and

(ii) Equitable set-off.

(i) **Set-off at law or Legal set-off.**—The legal set-off is contained in Rule 6 of Order 8, Civil Procedure Code.

The statutory provisions contained in this Rule are not exhaustive.

The legal set-off confers a right upon the defendant which he can claim by virtue of the statutory provision incorporated in Rule 6 of Order VIII but it does not take away the right of equitable set-off, in the circumstances in which the Court of Equity should feel justified in allowing the same. The rule only provides a second string to the bow.

Order VIII, Rule 6 is not exhaustive on the law of set-off nor does it take away any right of set-off, whether legal or equitable, which parties would have had independently of its provisions.

(ii) **Equitable set-off.**—In case where the cross-demands—

(a) arise out of one and the same transaction ; or

(b) are so connected in their nature and circumstances that they can be looked upon as part of one transaction,

it is held equitable to allow the defendant to plead a set-off, though the amount may be unascertained.

This is known as 'equitable set-off' which has been recognized by Rule 19 of Order 20 of the Code of Civil Procedure.

Equitable set-off exists not only in cases of mutual debts and credits but also where the cross-demands arise out of one and the same transaction or are so connected in their nature and circumstances as to make it inequitable that the plaintiff should recover, and the defendant be driven to a cross-suit. [*Kalanand Singh* v. *Sri Prasad Das*, 17 C. W. N. 1060].

Illustration.—A agrees to sell, and B agrees to purchase, 1000 bales of cotton. B takes delivery of 170 bales and is ready and willing to take delivery of the rest, but A fails to deliver them. A sues B for the price of 170 bales. B claims to set-off the damages sustained by him by reason of A's failure to deliver the remaining bales. B is entitled to claim the equitable set-off, as the claim arises out of the same transaction.

Distinction between legal set-off and equitable set-off.—(i) The legal set-off is limited to ascertained sum only whereas the equitable set-off is not so restricted. Equitable set-off can be allowed with respect to an unascertained sum of money.

(ii) In the case of legal set-off, the Court is bound to give judgment on the question of set-off but, in an equitable set-eff, the Court is not bound to give the finding upon it. It is within the discretion of the Court to consider or not to consider the equitable set-off in certain cases.

(iii) In the case of legal set-off, the amount should not be barred by the law of limitation at the date of the suit and it must be legally recoverable while a claim of equitable set-off may be allowed after it is barred by time at the date of the suit.

(iv) In the case of legal set-off, it is not necessary that the cross-demands must arise out of the same transaction whereas, under equitable set-off, it is very essential that the cross-demands must arise out of the one and the same transaction.

(4) **Defence or set-off founded on separate grounds.**—Where the defendant relies upon several distinct grounds of defence or set-off founded upon separate and distinct facts, they shall be stated, as far as may be, separately and distinctly. (O. 8, R. 7).

(5) **New ground of defence.**—Any ground of defence which has arisen after the institution of the suit or the presentation of a written statement claiming a set-off may be raised by the defendant or plaintiff, as the case may be, in his written statement. (O. 8, R. 8).

Subsequent pleadings.—No pleading subsequent to the written statement of a defendant other than by way of defence to a set-off shall be presented except by the leave of the Court and upon such terms as the Court thinks fit, but the Court may at any time require a written statement or additional written statement from any of the parties and fix a time for presenting the same. (O. 8, R. 9).

Failure of party to present written statement called for by Court.—Where any party from whom a written statement is so required, fails to present the same within the time fixed by the court, the court may—

(a) pronounce judgment against him ; or

(b) make such order in relation to the suit as it thinks fit. (O. 8, R. 10).

Various types of defences in various kinds of suits.—The defendant may in his written statement take the pleas mentioned hereafter by way of defences in various kinds of the suits.

No. 1

DEFENCE IN SUITS FOR GOODS SOLD AND DELIVERED

1. The defendant did not order the goods.

2. The goods were not delivered to the defendant.

3. The price of the geods delivered was not Rs.....

4. The defendant (or, A. B., the agent of the defendant) satisfied the claim by payment before the suit to the plaintiff (or, to C. D., the agent of the plaintiff) on the.....day of....., 19.....

5. The defendant satisfied the claim by payment after the suit to the plaintiff on the.....day of....., 19 .....

No. 2

DEFENCE IN SUITS ON BONDS

1. The bond is not the defendant's bond.

2. The defendant made payment to the plaintiff on the day according to the condition of the bond.

3. The defendant made payment to the plaintiff after the day named and before suit of the principal and interest mentioned in the bond.

No. 3

DEFENCE IN SUITS ON GUARANTEES

1. The principal satisfied the claim by payment before suit.

2. The defendant .was released by the plaintiff giving time to the principal debtor in pursuance of a binding agreement.

No. 4

DEFENCE IN ANY SUIT FOR DEBT

1. As to Rs. 200 of the money claimed, the defendant is entitled to set-off for goods sold and delivered by the defendant to the plaintiff.

Particulars are as follows :—

				Rs.
1907, January, 25th	...	...	...	150
" February 1st	...	...	...	50
			Total	200

2. As to the whole [or as to Rs. , part of the money claimed] the defendant made tender before suit of Rs. and has paid the same into Court.

No. 5

DEFENCE IN SUITS FOR INJURIES CAUSED BY NEGLIGENT DRIVING

1. The defendant denies that the carriage mentioned in the plaint was the defendant's carriage, and that it was under the charge or control of the defendant's servants. The carriage belonged to of Street, Calcutta, livery stable keepers employed by the defendant to supply him with carriages and horses and the person under whose charge and control the said carriage was, was the servant of the said

2. The defendant does not admit that the carriage was turned out of Middleton Street either negligently, suddenly or without warning, or at a rapid or dangerous pace.

3. The defendant says the plaintiff might and could, by the exercise of reasonable care and diligence, have seen the said carriage approaching him, and avoided any collision with it.

4. Tha defendant does not admit the statements contained in the third paragraph of the plaint.

No. 6

DEFENCE IN ALL SUITS FOR WRONGS

Denial of the several acts [or matters] complained of.

No. 7

DEFENCE IN SUITS FOR DETENTION OF GOODS

1. The goods were not the property of the plaintiff.

2. The goods were detained for a lien to which the defendant was entitled. Particulars are as follows :—

1907, May 3rd. To carriage of the goods claimed from Delhi to Calcutta : —

45 maunds at Rs. 2 per maund.....Rs. 90.

No. 8

DEFENCE IN SUITS FOR INFRINGEMENT OF COPYRIGHT

1. The plaintiff is not the author *(assignee etc.)*
2. The book was not registered.
3. The defendant did not infringe.

No. 9

DEFENCE IN SUITS FOR INFRINGEMENT OF TRADE MARK

1. The trade mark is not the plaintiff's.
2. The alleged trade mark is not a trade mark.
3. The defendant did not infringe.

No. 10

DEFENCE IN SUITS RELATING TO NUISANCES

1. The plaintiff's lights are not ancient [or deny his other alleged prescriptive rights].

2. The plaintiff's lights will not be materially interfered with by the defendant's buildings.

3. The defendant denies that he or his servants pollute the water [or do what is complained of].

[*If the defendant claims the right by prescription or otherwise to do what is complained of he must say in, and must state the grounds of the claim, i. e., whether by prescription, grant or what*].

4. The plaintiff has been guilty of laches of which the following are particulars :—

1870. Plaintiff's mill began to work.

1871. Plaintiff came into possession.

1883. First complaint.

5. As to the plaintiff's claim for damages the defendant will rely on the above grounds of defence, and says that the acts complained of have not produced any damage to the plaintiff. *If other grounds are relied on, they must be stated*, e. g., *limitation as to past damage*.]

———

No. 11

DEFENCE TO SUIT FOR FORECLOSURE

1. The defendant did not execute the mortgage.

2. The mortgage was not transferred to the plaintiff [*if more than one transfer is alleged say which is denied*].

5. The suit is barred by Article of the Second Schedule to the Limitation Act, 1963.

4. The following payments have been made, viz :—

				Rs.
(*Insert date*)——	...	...	...	1,000
(*Insert date*,——	...	...	...	500

5. The plaintiff took possession on the of and has received the rents ever since.

6. The plaintiff released the debt on the of

7. The defendant transferred all his interest to A. B. by a document dated

———

No. 12

DEFENCE TO SUIT FOR REDEMPTION

1. The plaintiff's right to redeem is barred by article of the Second Schedule to the Limitation Act, 1963.

2. The plaintiff transferred all interest in the property to A. B.

3. The defendant, by a document dated the day of transferred all his interest in the mortgage-debt and property comprised in the mortgage to *A. B.*

4. The defendant never took possession of the mortgaged property, or received the rents thereof.

(*If the defendant admits possession for a time only, he should state the time, and deny possession beyond what he admits*).

No. 13

DEFENCE TO SUIT FOR SPECIFIC PERFORMANCE

1. The defendant did not enter into the agreement.

2. *A. B.* was not the agent of the defendant (*if alleged by plaintiff*).

3. The plaintiff has not performed the following conditions—(*Conditions*).

4. The defendant did not—(*alleged acts of part performance*).

5. The plaintiff's title to the property agreed to be sold is not such as the defendant is bound to accept by reason of the following matter—(*State why*).

6. The agreement is uncertain in the following respects—(*State them*).

7: (*or*) The plaintiff has been guilty of delay.

8. (*or*) The plaintiff has been guilty of fraud (*or* misrepresentation).

9. (*or*) The agreement is unfair.

10. (*or*) The agreement was entered into by mistake.

11. The following are particulars of (7), (8), (9), (10) or (*as the case may be*).

12. The agreement was rescinded under Conditions of Sale, No. 11 (*or by mutual agreement*).

(*In cases where damages are claimed and the defendant disputes his liability to damages, he must deny the agreement or the alleged breaches, or show whatever other ground of defence he intends to rely on* e. g., *the Indian Limitation Act, accord and satisfaction, release, fraud*, etc).

No. 14

DEFENCE IN ADMINISTRATION SUIT BY PECUNIARY LEGATEE

1. *A. B*'s will contained a charge of debts; he died insolvent; he was entitled at his death to some immovable property which the defendant sold and which produced the net sum of Rs. , and the testator had some movable property which the defendant got in, and which produced the net sum of Rs.

2. The defendant applied the whole of the said sums and the sum of Rs. which the defendant received from rents of the immovable property in the payment of the funeral and testamentary expenses and some of the debts of the testator.

3. The defendant made up his accounts and sent a copy thereof to the plaintiff on the day of 19 , and offered the plaintiff free access to the vouchers to verify such accounts, but he declined to avail himself of the defendant's offer.

4. The defendant submits that the plaintiff ought to pay the costs of this suit.

No. 15

PROBATE OF WILL IN SOLEMN FORM

1. The said will and codicil of the deceased were not duly executed acc rding to the provisions of the Indian Succession Act, 1865 [*or* of Hindu Wills Act, 1870].

2. The deceased at the time of the said will and codicil respectively purport to have been executed, was not of sound mind, memory and understanding.

3. The execution of the said will and codicil was obtained by the undue influence of the plaintiff [and others acting with him whose names are at present unknown to the defendant.]

4. The execution of the said will and codicil was obtained by the fraud of the plaintiff, such fraud so far as is within the defendant's present knowledge, being [*state the nature of fraud.*]

5. The deceased at the time of the execution of the said will and codicil did not know and approve of the contents thereof [*or* of the contents of the residuary clause in the said will, *as the case may be.*]

6. The deceased made his true last will, dated the 1st January, 1873, and thereby appointed the defendant sole executor thereof.

The defendant claims—

(1) that the Court will pronounce against the said will and codicil propounded by the plaintiff;

(2) that the Court will decree probate of the will of the deceased, dated the 1st January, 1873, in solemn form of law.

CHAPTER VIII

EXAMINATION OF PARTIES BY COURT

Ascertainment by Court of admissions and denials.—At the first hearing of the suit, the Court shall ascertain from each party or his pleader whether he admits or denies such allegations of fact as are—

(a) made in the plaint or written statement (if any) of the opposite party, and

(b) not, expressly or by necessary implication, admitted or denied by the party against whom they are made.

The Court records such admissions and denials. (O. 10, R. 1).

Oral examination of Party.—At the first hearing of the suit or at any subsequent hearing,—

(a) any party appearing in person or present in Court ; or

(b) any person able to answer any material questions relating to the suit by whom such party or his pleader is accompanied,

may be examined orally by the Court.

The Court may, if it thinks fit, put, in the course of such examination, questions suggested by either party. (O. 10, R. 2).

The substance of the examination shall be reduced to writing by the Judge, and shall form of part the record. (O. 10, R. 3).

Consequence of refusal or inability of pleader to answer.—(1) Where the pleader of any party who appears by a pleader or any such person accompanying a pleader as is referred to in rule 2, refuses or is unable to answer any material question relating to the suit which the Court is of opinion that the party whom he represents ought to answer, and is likely to be able to answer if interrogated in person, the Court may postpone the hearing of the suit to a future day and direct that such party shall appear in person on such day.

(2) If such party fails without lawful excuse to appear in person on the day so appointed, the Court may pronounce judgment against him, or make such order in relation to the suit as it thinks fit. (O. 10, R. 4).

CHAPTER IX
ADMISSIONS

Notice of admission of case.—Any party to a suit may give notice—

(a) by his pleading, or

(b) otherwise in writing,

that he admits the truth of the whole or any part of the case of any other party. (Order 12, rule 1).

Notice to admit documents.—Either party may call upon the other party to admit any document, saving all just exceptions.

In case of refusal or neglect to refuse, after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the suit may be unless the Court otherwise directs.

No costs of proving any document shall be allowed unless such notice is given, except where the omission to give the notice is, in the opinion of the Court, a saving of expense. (O. 12, Rule 2).

The notice to admit or deny documents is to be in Form No. 9 given in Appendix C of the Code of Civil Procedure with such variations as circumstances may require, but, in practice, in the Courts of the State of Uttar Pradesh, no such written notice is given and, instead, documents are produced before the counsel of the opposite party for admission or denial, and the counsel concerned, after looking into the documents, admits or denies them. If he admits, then the documents are exhibited on the record and an exhibit mark is put on them meaning that no further evidence is required to prove them. If he does not admit them the party producing them has to prove them in the ordinary manner. (*Per* Agarwala, J., in *Ajodhya Prasad Bhargava* v. *Bhawani Shanker Bhargava*, 1957 A. L. J. 350 (F. B.)).

Power of Court to record admission.—Notwithstanding that no notice to admit documents has been given under Rule 2, the Court,—

(a) at any stage of the proceeding before it,

(b) of its own motion,

(i) may call upon any party to admit any document and

(ii) shall, in such a case, record whether the party admits, or refuses or neglects to admit, such document. (O. 12, Rule 3-A).

Notice to admit facts.—Any party may,—

(a) by notice in writing,

(b) at any time not later than 9 days before the day fixed for the hearing,

call on any other party to admit, for the purposes of the suit only, any specific fact or facts, mentioned in such notice.

In case of refusal or neglect to admit the same—

(a) within 6 days after service of such notice, or

(b) within such further time as may be allowed by the Court,

the costs of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the suit may be unless the Court otherwise directs.

Any admission made in pursuance of such notice is to be deemed to be made—

(a) only for the purposes of the particular suit, and

(b) not as an admission to be used—

(i) against the party on any other occasion, or

(ii) in favour of any person other than the party giving the notice.

The Court may, at any time, allow any party to amend or withdraw any admission so made on such terms as may be just. (O. 12, Rule 4).

Judgment on admissions.—Any party may,—

(a) at any stage of a suit,

(b) where admissions of fact have been made—

(i) on the pleadings, or

(ii) otherwise,

apply to the Court for such judgment or order as upon such admissions he may be entitled to,

without waiting for the determination of any other question between the parties.

The Court may, upon such application,—

(a) make such order, or

(b) give such judgment,

as the Court may think just. (O. 12, Rule 6).

When there are three suits and one of the suits can be disposed of on the admissions of the defendants, then keeping that case pending would be unjustified merely because admissions have not been made in the other cases.

When—

(a) the partnership of the parties,

(b) their respective shares in the partnership, and

(c) the liability of the partnership to be dissolved,

are all admitted, then continuing with the trial of the suit for dissolution of the partnership would be unnecessary and not serve any purpose. Under the particular circumstances of the case, exercise of the inherent power in passing the preliminary decree would be both justified and appropriate.

Admissions in Pleadings.—The well-known principle has been laid down in the Privy Council case of *Chundra Kunwar* v. *Narpat Singh*, (1907) I. L. R. 29 All. 184 (P. C.) : 17 M. L. J. 103 (P. C.), that what a party himself admits to be true, may reasonably be presumed to be so unless the party making the admission gives evidence to rebut the presumption, and, unless and until that is satisfactorily done, the facts admitted must be taken to be established.

In this case, the Privy Council upheld the factum of adoption because the party who admitted the adoption, offered explanation with regard to his admissions which were found to be either absurd or unproved, and the admissions were, therefore, given full effect.

In the Privy Council case of *Bal Gangadhar Tilak* v. *Shri Niwas Pandit*, A. I. R. 1915 P. C. 7, the suit was for a declaration of the validity of the adoption of Jagannath, one of the plaintiffs. Three of the trustees appointed by the late Shri Vasudev Harihar Pandit were also impleaded as co-plaintiffs. The fourth trustee was impleaded as a pro-forma defendant. The widow of Shri Vasudev Harihar Pandit was the main contesting defendant in the case. The will of Shri Vasudev Harihar Pandit permitted the widow to adopt a boy, and the trustees were to carry on the management of the estate until the boy attained majority. A boy was selected and the widow wrote a letter to the boy's natural father agreeing to take the boy in adoption. These proceedings were commenced on 27th June but were completed on 28th June.

It was alleged on behalf of the plaintiffs that the boy was put on the lap of the widow in performance of the requisite essential for adoption, but the formal ceremonies and festivities were postponed to take place afterwards.

The widow alleged that the boy was not put on her lap and that, therefore, the actual giving and taking ceremony was not performed.

Mr. Tilak, one of the trustees, wrote out a full account of the transaction which was recorded in the minutes, and the trustees who had not taken part in the proceedings, were communicated with to the effect that the adoption had been completed. These minutes and the letters were put in evidence, probably by the plaintiffs to prove the completion of the adoption.

On behalf of the plaintiffs, Tilak and Khaparde (two of the trustees) who were the plaintiffs, appeared as witnesses along with several other persons. They all swore to the factum of adoption.

On behalf of defendants, certain witnesses were produced.

The Subordinate Judge came to the conclusion that the evidence of the plaintiffs established their case and he decreed the suit.

On appeal, the High Court of Bombay came to a different conclusion, namely, that the account given by the witnesses appeared to be a true account of many of the series of events and a false account of, at least, one and the most important regarding the taking of the child on the lap. Certain expressions and omissions were used merely to contradict the oral testimony of the witnesses and to show that the witnesses had perjured themselves. On an appeal by the plaintiffs, the Privy Council observed that—

(a) Upon a proper reading of the documents, no inference adverse to the evidence of witnesses of the plaintiffs could be drawn from them.

(b) The High Court was guilty of a serious irregularity in procedure, in that they had relied upon certain statements and written documents and omissions without these statements and omissions being put to the witnesses.

On general principles, it would appear to be sound that if a witness is under cross-examination on oath, he should be given the opportunity, if documents are used against him, to tender his explanation and to clear up the particular point of ambiguity or dispute. This is a general, salutary and intelligible rule, and, where a witness's reputation and character are at stake, the duty of enforcing this rule would appe .r to be singularly clear.

(c) The law of India as enacted in Section 145 of the Evidence Act also pronounces upon the same matter.

In this Privy Council case, the Privy Council did not consider whether the documents were admissible in evidence as admissions even though the statements were not put to the witnesses. At no stage of the case in the trial Court, the statements in the documents were relied on as admissions of the plaintiffs in proof of the case of the defendants. They were relied on merely as falsifying the witnesses.

The law on the subject has been clearly laid down by Mahajan, J., in a Full Bench decision of the Lahore High Court in *Firm Malik Des Raj Faquir Chand* v. *Firm Piara Lal Aya Ram*, A. I. R. 1946 Lah. 65 (F. B.) : 223 I. C. 579 as under :—

"An admission made by a party in—

(a) proceedings antecedent to the suit, or

(b) letters and documents executed by him,

is a valuable piece of evidence against the party making those admissions and must be available to his adversary if that party, during litigation, pleads contrary to his own previous admissions.

That principle of law, however, ceases to have any application where the party who had made the previous admissions, goes into the witness-box and on oath gives evidence flatly inconsistent with what he had stated previous to the suit.

Before his opponent can be allowed on the basis of the previous admissions, to argue that the party in the witness box has perjured himself, it is only fair that he is given an opportunity to explain his strange and inconsistent attitude. In other words, before a man is condemned as a liar, the material on the basis of which that charge is levelled against him, must be placed before the witness and he must be confronted with those previous statements which form the basis of the charge of perjury against him.

If that is not done, then another principle of law comes into play which excludes the previous statements from being treated as legal evidence on the issue in question, and that principle is that no man should be condemned as a criminal till he is afforded an opportunity to defend himself and that opportunity cannot be offered till his attention is drawn to the matter on which the charge of perjury is laid against him.

This principle, however, is inapplicable to the case where nothing has been said directly or indirectly by the witness against his previous statement or admissions and no contradiction is involved in his statement in the witness-box read as a whole of the previous admission made by him.

Again, that principle is wholly inapplicable when the party making the previous admissions has not appeared in the witness-box.

No question of perjury arises in either of these two situations and, therefore, the principle that, to some extent, qualifies the general rule that admissions are good form of evidence and are relevant against the party, making them, has no application in these two latter kind of cases."

The statement of law in this Full Bench case when a party enters the witness-box and makes a statement inconsistent with the previous statement, his duty of explaining the previous admission ceases and it becomes the duty of the party relying upon the previous admission, to confront him with his previous statement and to ask for his explanation, has been held to be in the teeth of the decision of the Privy Council in *Rani Chandra Kunwar* v. *Narpat Singh*, I. L. R. 29 All. 184 (P. C.) (Per Agarwala, J., in *Ajodhya Prasad Bhargava* v. *Bhawani Shankar Bhargava*, 1957 A. L. J. 350 (F. B.)).

To sum up, the law may be stated thus :—

"(1) A party to a case may prove an admission made by another party to the case in support of his own case in respect of a question in issue or a relevant fact.

Such admission, when proved, is substantive evidence in the case in support of the party relying on the admission and shifts the burden of proving the contrary upon the party making the admission.

(2) The effect of his previous admission can be removed by a party by—

(a) offering an explanation as to the circumstances in which it was made ; or

(b) proving facts which go to show that the admission was erroneous or bore some other meaning.

But the duty to do so is upon the party who makes the admission, mere a bald statement by him, when he appears as a witness for himself contrary to his previous admission without any such explanation or proof of circumstances as referred to above, does not discharge the burden that lies upon him.

Consequently, the party relying on the admission is entitled to say that the oral statement on oath contrary to the unexplained previous statement is not worthy of reliance.

(3) Section 145 of the Evidence Act refers to a previous statement of a witness, be he a party or a stranger to the case, which—

(a) has not already been proved on the record, and

(b) is sought to be proved for the purpose of contradicting the statement on oath of the witness.

The section lays down that a witness cannot be contradicted by his previous statement unless it has been specifically put to him while he is in the witness-box.

(4) Section 145 has no application to an admission of a party which has already been proved on the record and therefore it does not prohibit such admission being used to contradict the statement on oath of the party making the admission.

(5) There is, however, a general principle of fairness according to which the statement of a witness on oath may not be contradicted by his previous statement unless—

(a) such previous statement was specifically put to him, and
(b) he was offered an opportunity of tendering such explanation as he might desire to offer.

This rule of fairness can have no application when—

(a) a clear and unambiguous statement of a party has been already proved on the record, and

(b) the party appearing as a witness already knows that his previous statement is relied upon by his opponent in support of his own case.

(6) Where, however, a statement of a party is ambiguous or vague so that it cannot be said that he has notice that such statement is being relied upon by his opponent as his admission, the rule of fairness comes into play, and such party's oral evidence will not be allowed to be contradicted by his vague and ambiguous previous statement unless it was specifically put to him while he was in the witness-box so that he might tender an explanation regarding the statement, and, in these circumstances, though such statement may have been admitted under Section 21 of the Evidence Act, it will be deemed to have been disproved by a contrary statement on oath of the party making the admission." (*Per* Agarwala, J., *ibid.*).

The conclusions of Beg. J., in *Ajodhya Prasad Bhargava* v. *Bhawani Shankar Bhargava*, 1957 A. L. J. 350 (F. B.) are as follows:—

(1) Neither section 21 nor entire chapter 2 of the Evidence Act contains any express words of limitation showing that the said section is, in any way, controlled or limited by the provisions of section 145 of the Act.

Further, no such limitation appears to be imposed by implication.

(2) An examination of section 145 also shows that, neither by express words nor by necessary implication, does it control or limit section 21 of the Evidence Act. On the other hand, it shows the just contrary.

(3) Admissions being substantive pieces of evidence, their admissibility is not dependent on the appearance or non-appearance of the party as a witness.

Section 145 would, therefore, have no application to this class of evidence.

(4) To hold otherwise would be to contravene the well-recognised rule that admissions shift the onus of proving the contrary on the party against whom they are set up.

(5) The position of a party-witness is quite different from that of an ordinary witness.

The reasons that exist for laying the foundation of fore-warning before contradicting an ordinary witness, do not apply to the case of a party-witness at all.

The *majority* opinion in the above Allahabad Full Bench case was as follows :—

(a) Where, in a civil suit,—

(i) a party produces documents containing admissions by his opponent, which documents are admitted by the counsel of the opponent, and

(ii) the opponent enters the witness-box,

it is not obligatory on the party who produces those documents, to draw in cross-examination the attention of the opponent to the said admissions before he can be permitted to use them for the purpose of contradicting the opponent :

Provided that the *admissions* are *clear and unambiguous.*

But where the statements, relied on as admissions, are ambiguous or vague, it is obligatory on the party who relies on them, to draw in cross-examination the attention of the opponent to the said statements before he can be permitted to use them for the purposes of contradicting the evidence on oath of the opponent.

(b) The party producing these documents can be permitted under section 21 of the Evidence Act to use them as substantive evidence in the case without drawing in cross-examination the attention of the opponent to those admissions.

A party is not bound by an admission in his pleading except for the purposes of the suit in which the pleading is delivered. (*Ramabai Sriniwas* v. *Government of Bombay*, A. I. R. 1941 Bom. 144 (D. B.) : 194 I. C. 431). This proposition has been held too widely stated in the case of *Tilkayat Govindlalji* v. *State*, A. I. R. 1962 Raj. 196, (D. B.) : I. L. R. (1962) 12 Raj. 406 : 1962 Raj. L. W. 317 where Tilkayat himself had admitted in his written statement filed in the previous suit under section 92, C. P. C., the public character of the institution, and it was held :

"This Bombay proposition is too widely stated. Whatever may be the rule of English law, the provisions of the Evidence Act do not contain any such exception.

Under section 23 of the Evidence Act, however, in a civil case, no admission, if it is made either—

(i) upon an express condition that evidence of it is not to be given, or

(ii) under circumstances from which court can infer that there is such an agreement between the parties,

is relevant.

In this Rajasthan case, the written statement was the result of a compromise arrived at carlier, and, therefore, no reliance was placed on such an admission of Tilkayat.

Admissions made *in a suit* have special value in view of the provisions of section 58 of the Evidence Act. But admissions made *in other proceedings*, though relevant, would not be conclusive, and it can be shown that the admission made is incorrect or based on a misunderstanding. (*Shriram Sardarmal Didwani* v. *Gouri Shankar*, A. I. R. 1961 Bom. 136 (D. B.) : 62 Bom. L. R. 336).

It sometimes happens that persons make statements which serve their purpose, or proceed upon ignorance of the true position ; and it is not their statements, but their relations with the estate, which should be taken into consideration in determining the issue. (*Venkatapati Raju* v. *Venkatanarasimha Raju*, A. I. R. 1936 P. C. 264 at pages 268-269 : 63 I. A. 397 at page 406 ; *Mst. Rukhmabai* v. *Lala Laxminarayan*, A. I. R. 1960 S.C. 335 : (1960) 2 S. C. R. 253 : (1960) 1 S. C. A. 624 : 1960 S. C. J. 433)."

In *Thirumal Reddi* v. *Koppiah Reddiar*, [1966] 2 M. L. J. 155 : 79 Mad. L. W. 326, Kailasam, J., upheld the case of adoption based upon the admission of the party concerned in a series of documents, which admissions were not satisfactorily explained. The learned Judge discussed all the relevant cases in which, even though there was no proof relating to the factum of adoption either with regard to the giving and taking or in regard to the observances of the necessary ceremonies, the adoption was upheld on the ground that the party who had admitted the adoption, had not satisfactorily explained as to why such admissions were made. It was observed :

"The burden to prove adoption is initially on the party asserting it. But if the defendant has himself admitted in a series of documents that the plaintiff is the adopted son of B, the onus of proving that there was, in fact, no such adoption, shifts upon the defendant.

What a party himself admits to be true, may reasonably be presumed to be so. It cannot be the case of estoppel and, therefore, the party admitting can give evidence to rebut the presumption, but unless this is satisfactorily done, the fact admitted must be taken to be established."

In this Madras case, the lower appellate court held that the factum of adoption had not been satisfactorily proved, despite the admission of the party concerned in several documents. But Kailasam, J., reversed that judgment, taking the view that the recitals which constituted powerful admissions, threw the burden upon the other side and as the burden had not been discharged by satisfactory explanation as to why such admissions were made there was no need for further proof of the factum of adoption and the party should be held bound by what he had already admitted.

In the case of joint family, —

(a) the admissions of the father, or

(b) the admissions of the managing member,

would not, by their own force, bind the other members of the family, and the admissions cannot be used against them on the ground that the managing member or the father, as the case may be, did not satisfactorily account for those admissions. The junior members can always prove that the admissions are either untrue or incorrect. If the managing member or the father had made an admission while acting on behalf of the family or for acquiring properties for the family or for protecting the interests of the family and where, what he does is on behalf of himself and on behalf of the members of the family, the admission made in that representative character may be used as against all the members. But, if such an admission was mode by the managing member or by the father to advance his own interests and to acquire property for himself, and what he acquires would be his own acquisition which he is not bound to share with the other members or the sons, such an admission cannot bind the sons. The position is a fortiori if such an admission advances not only the personal interests of the managing member or the father but also prejudicially affects the interests of the other members.

In *Jagmohan Lakhmichand* v. *Ranchoddas*, A. I. R, 1946 Nag. 84 : I. L. R. (1945) Nag. 992, it was held (that in a joint Hindu coparcenary, a son does not deprive interest in the coparcenary property through his father and hence the son cannot be said to be the representative-in-interest of the father under Section 21 of the Evidence Act, which deals with the binding nature

of admissions. The same view was held about the scope of Section 21 of the Evidence Act in the case of *Nagendranath Ghosh* v. *Lawrence Jute Co. Ltd.*, A. I. R. 1921 Cal. 197 : 25 C. W. N. 89, in which it was held that the admission of a member of a Hindu family cannot be used as against the other members of the joint family.

In *Pratap Kishore* v. *Gyanendranath*, A. I. R. 1951 Ori. 313, it was held that admissions about the factum of adoption cannot be used as against the other members of the joint family. On the same principle, it has been held that in a suit on a mortgage executed by the father, where the father has unambiguously admitted the receipt of the consideration, the admission is held *prima facie* proof against the father only and a decree is passed against him. But as against the sons, the admission of the father cannot be used with that effect and the burden will be upon the mortgagee to prove that he advanced the loan. (*Vide* the decision of the Privy Council in *Thakur Bhagwan Singh* v. *Bishamber Nath*, A. I. R. 1940 P. C. 114 : (1940) 2 M. L. J. 452). In *Sreeramulu* v. *Thandavakrishnayya*, A. I. R. 1943 Mad. 77 : (942) 2 M. L. J. 452, this decision of the Privy Council was followed and it was held that if the mortgagee wanted to enforce his mortgage rights against the son's interests, the mortgagee would have to establish that the mortgage had been executed by the father either for legal necessity or for payment of an antecedent bebt, and the recitals by the mortgagor alone would be insufficient against the sons to shift the onus of proof.

Admissions have to be clear if they are to be used against the person making them. They are substantive evidence by themselves in view of Sections 17 and 21 of the Indian Evidence Act, though they are not conclusive proof of the matters admitted.

The admission duly proved are admissible evidence irrespective of whether the party making them appeared in the witness box or not and whether that party, when appearing as witness, was confronted with those statements in case it made a statement contrary to those admissions. The purpose of contrdicting the witness under Section 145 of the Evidence Act is very much different from the purpose of proving the admission. Admission is substantive evidence of the fact admitted while a previous statement used to contradict a witness, does n t become substantive evidence and merely serves the purpose of throwing doubt on the veracity of the witness. What weight is to be attached to an admission made by a party is a matter different from its use as admissible evidence.

Assuming that there was an admission, the same is not conclusive in character. An admission is just one piece of evidence and it is open to the fact finding Tribunals to rely on that piece of evidence or not to rely on the same. Therefore, if the Tribunals refuse to rely on that admissi on, the High Court cannot say, in exercise of writ jurisdiction, that they have committed any error of law, much less an error apparent on the face of the record.

It is true that, except in situations creating an estoppel, it is open to a party to show that the circumstances attending the making of a statement which is sought to be used against him as an admission, were such as diminished or even destroyed its value.

He may prove that the statement was—

(a) incorrect, or

(b) even deliberately untrue, and

(c) was made in order to gain a particular object or serve a particular purpose.

But he can do so only by evidence of a cogent and satisfactory nature, and he cannot get rid of the force and effect of his admission merely by suggestions made in argument as to possibility of error or probable reason or motive for the statement having been incorrect or untrue.

The value and effect of an admission were emphasised by the Supreme Court in *Naryan Bhagwant Rao Gosavi Balaji wala* v. *Gopal Vinayak Gosavi*, A. I. R. 1960 S. C. 100: (1960) 1 S. C. R. 773 : (1960) 2 S. C. A. 153 : 1960 S. C. J. 263 where it was observed that an admission is the best evidence that an opposing party can rely upon, and though not conclusive, is decisive of the matter, unless successfully withdrawn or proved erroneous.

If a party desires that a previous statement made by him and amounting to an admission, may not be effective against him, the least that he is expected to do is—

(a) to repudiate the correctness or truth of that statement by his evidence, and

(b) to explain the circumstances in which the statement came to be made and the reason or the motive for making it.

But if even that is not done by him, he cannot ask the Court to ignore the admission or minimise its value and effect on the basis of a mere hypothesis put forward in argument. It may be that the defendants had a motive for making a wrong allegation regarding the mental capacity of the plaintiff in a suit filed by them for assailing an alleged adoption and restraining her from wasting her husband's property, but there is no reason whatever for the Court to suppose, in the absence of evidence, that the statement made by them in that respect was actually promoted by that motive and it did not represent the truth.

It is only when a party makes a statement inconsistent with an earlier statement that the occasion for calling his attention to the inconsistency may arise, but when no statement at all is subsequently made by him in regard to the matter on which he had made the earlier statement, there is no inconsistency to which his attention may be called, and obviously section 145 of the Evidence Act cannot in that case, act as a bar to the use of the earlier statement. The section cannot be construed as requiring that, even though a party has not chosen to state anything contrary to, or explanatory of, an admission already on record, he should be questioned with reference to it in cross-examination and asked whether he adheres to it or repudiates it, before the admission can be utilised against him. This would amount to requiring that the party who has not repudiated or stated anything contrary to an earlier statement of his amounting to an admission, should first be given a chance to contradict himself and then to reconcile or explain the contradiction if he can. There is nothing either in Section 145 of the Evidence Act or in principle to support this proposition.

Making out new case for a party.—The appellant plaintiff was appointed as the Works Manager of the respondent company on October 15, 1947. Towards the end of October, 1950, the second defendant who had a controlling interest in Ashoka Textiles Ltd., as well as the respondent company, asked the appellant to temporarily function as the Works Manager of Ashoka Textiles Ltd. The appellant still continued to be in the service of the respondent. After he began to function as Works Manager of the Ashoka Textiles Ltd., he was being paid a monthly salary of Rs. 1000 though

under exhibit D, he was entitled to a salary of Rs. 1600 p. m. The services of the appellant were improperly terminated on August 3, 1951.

The High Court overruling the contention of the respondent, and agreeing with the trial court, held that the appellant inspite of functioning as the Works Manager of Ashoka Textiles Ltd., continued to be in the service of the respondent, and further that at no time any change was effected by agreement of parties in the conditions of the service, under which the appellant entered into service but yet it opined that he was only entitled to get a salary of Rs. 1,000 per month from the date he took over the management of Ashoka Textlies Ltd., as he was paid at that rate without any objection, and therefore he must be held to have acquiesced to the rate at which he was paid. The High Court overruled the objection of the appellant regarding the set off given in respect of the money said to be due under the promissory note referred to earlier.

It has to be *held* that the High Court was entirely wrong in making out a new case for the respondent. No plea based on acquiescence was taken in the pleadings and no issue raised in that regard, The only controversy between the parties was whether in October. 1950 there was tripartite agreement between the appellant-respondent and the Ashoka Textiles Ltd., under which the plaintiff was appointed under the Ashoka Textiles Ltd. Both the trial court as well as the High Court, have negatived the alleged tripartite agreement pleaded by the respondent. They had come to the conclusion that the plaintiff continued to be in the service of the respondent, even after he took over the management of Ashoka Textile Ltd. In view of this finding, it follows that the terms under which the appellant continued to serve the respondent is as mentioned in exhibit D. Therefore the trial court was right in its conclusion that the appellant was entitled to a salary of Rs. 1600 par month, (in view of the increment to which he was entitled) as per the terms mentioned in exhibit D, from the date his services were unlawfully terminated till 15-10-1952 i. e. the date of termination of the service fixed under the contract. It may also be mentioned at this stage that no witness on behalf of the respondent had deposed to the acquiescence referred to in the judgment of the High Court, and restore that of the trial court as regards the salary to which the appellant was entitled from the date of the termination of his service till the end of the contract period.

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CHAPTER X

ISSUES

Issues when arise.—Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other. (O. 14, R. 1 (1)).

Material propositions.—Material propositions are those propositions of law or fact which—

(a) a plaintiff must allege in order to show a right to sue ; or

(b) a defendant must allege in order to constitute his defence. (O. 14, R. 1 (2)).

Each material proposition affirmed by one paty and denied by the other forms the subject of a distinct *issue*. (O. 14, R. 1 (3)).

Kinds of Issues.—Issues are of two kinds :—

(a) Issues of fact ; and

(b) Issues of law. (O. 14, R. 1 (4)).

Mixed questions of law and fact.—The question of adverse possession is always a mixed question of fact and law. Therefore, if the decision of the lower courts on this question is erroneous, the High Court can interfere in second appeal, because the question involved is one of law as well. (*Velliyottummel Sooppi* v. *Nadukandy Moossa*, A. I. R. 1969 Ker. 222 (D.B.) : I. L. R. (1968) 2 Ker. 488 : 1968 Ker. L. R. 606 : 1969 Ker. L. T. 121).

Questions of fact.—The finding that—

(a) there was no re-constitution of the firm which got dissolved with the death of a partner ; and

(b) there was no settlement of accounts of the firm at any time,

are findings of fact which, as they stand, are unimpeachable in second appeal. (*M. M. Valliammai Achi* v. *V. Ramanathan Chettiar*, A. I. R. 1969 Mad. 257 (S. J.)).

Question of 'Benami'.—It is true that the absence of motive for benami is not always conclusive on the question of benami. But when—

(a) the purchase in the names of one or other or some of the members of the family is consistent with an intention to make the acquisitions for the family ; and

(b) there is nothing unusual in such acquisition.

Certainly the Court may give some weight to—

(i) the absence of motive, and

(ii) the absence of an acceptable explanation,

for taking the sale deeds in the names of his sons.

Even as the absence of a motive need not necessarily exclude the theory of benami, the fact that some motive is shown, will equally not bar the rejection of the plea of benami.

While, on questions of benami, the Court will not indulge in suspicion and surmise, it will have to take into consideration the facts and circumstances

as established by the record and, from an overall picture of the entire evidence, draw its inference.

The following are the various features which may severally or cumulatively weigh and tilt the scale one way or other :—

(a) Mot ve ;

(b) The source of consideration ;

(c) The possession of the property and its enjoyment ; and

(d) Custody of the title deeds.

But these features are not exhaustive of the circumstances on which the final conclusion of the Court has to be based. Nor can it be said that, in all cases, the presence or absence of one or the other of these circumstances will be helpful in deciding the real position. At times, other considerations may play a vital part in the determination. In certain circumstances, only one or the other of the above specified elements may alone be of assistance.

In *Ram Narain* v. *Md. Hadi*, (1899) I. L. R. 26 Cal. 227 (P. C,) : 26 I· A. 38, the Privy Council held as follows :—

"The first court had attributed too much to the fact that the plaintiff had supplied the purchase money, an important fact in most of the cases raising the question of benami or not benami, but not the only test of ownership."

In *Sitamma* v. *Sitapati Rao*, A. I. R. 1938 Mad. 8 : (1937) 2 M. L. J. 606, it was observed as follows :—

"The mere suspicion that the purchase might not have wholly been made with the lady's money, will certainly not suffice to establish that the purchases were benami, nor even the suspcion that moneys belonging to Jagannadha Rao, whether in a similar measure or a larger measure, must have also contributed to these purchases.

Even in cases where there is positive evidence that money had been contributed by the husband and not by the wife, that circumstance is not conclusive in favour of the benami character of the transaction, though it is an important criterion."

The *onus* lies, in the first instance, on the person who pleads that the transaction is benami. (*Sitamma* v. *Sitapati Rao*, A. I. R. 1938 Mad. 8 : (1937) 2 M. L. J. 606).

The question of benami is essentially one of fact and when the decision has been given on the merits, bearing in mind the well-established principles for the determination of the question of benami, the second appellate Court has no jurisdiction to interfere in the matter.

Framing of Issues.—At the first hearing of the suit, the Court shall—

(a) after—

(i) reading the plaint and the written statement (if any) ; and

(ii) such examination of the parties as may appear necessary,

ascertain upon what material propositions of fact or law, the parties are at variance ; and

(b) thereupon proceed to frame and record the Issues on which the right decision of the case appears to depend. (O. 14, .R. 1 (5)).

But the Court is not required to frame and record issues where the defendant at the first hearing to the suit makes no defence. (O. 14, R. 1 (6)).

Instead of framing a separate issue with regard to each charge of corrupt practice raised in the election petition, the court frames the issue in a manner which leaves much to be desired. For instance it should have framed separate issue with regard to each of the pamphlets. The issues should further have specified the different heads of corrupt practice committed in respect of each of the pamphlets. However, because of the unsatisfactory nature of the issues framed, the whole trial is not vitiated because the appellant knew exactly what points he had to meet, and evidence was adduced about the publication and distribution of the pamphlets by the election petitioner and contradicted by the appellant. (*Shaikh Mahamad Umarsaheb* v. *Kadalaskar Hasham Karimsab*, A. I. R. 1970 S. C. 61 : (1969, 1 S. C. C. 741).

The plaintiff Bank instituted a suit for the recovery of Rs. 61,883/- against the first defendant K and the legal representatives of B, who were defendants 2 to 4, on the allegations that—

(a) The first defendant and the ancestor of defendants 2 to 4, who was the brother of the first defendant, opened a current account on 6-2-1945 with the plaintiff-Bank.

(b) Under the said Account, the first defendant and his brother B used to deposit and draw, by way of overdraft, as per the Rules of the Bank as and when it was necessary.

(c) The first defendant and his brother obtained Rs. 1615/- on 9-9-47 under the said account. That was the last entry in the said account.

(d) The first defendant and his brother had agreed to pay Re. 1/- per month per Rs. 100/- as interest, on the amount overdrawn by them.

(e) On taking accounts from the date of opening, that is to say, from 6-2-45 to 31-12-48, it was found that a sum of Rs. 61,883/- was due.

(f) The first defendant and his brother, while drawing the amount of Rs. 1615/- on 9-9-1947, confirmed the balance which was due to the Bank from them.

(g) The first defendant's brother died in June, 1948, and the defendants 2 to 4 are his legal representatives, being his wife and two sons.

(h) The defendant No. 3 on 4-1-49, also admitted the debt and promised to repay the same.

(i) Though the last day of payment was 3-1-47 yet, in view of the acknowledgments made on 9-9-47 and 4-1-49, the suit was within time.

It was, therefore, prayed that a decree for a sum of Rs. 61,883/- be passed in favour of the plaintiff against the first defendant and against the assets of his brother in the hands of defendadts 2 to 4.

The *first defendant in his Written Statement* denied to have opened any joint current account with the plaintiff-Bank and contended that he had no connection whatsoever with the transactions of his brother. He, however,

admitted that, on 9-9-47, his brother had obtained Rs. 1615/- from the plaintiff Bank. He, however, stated that—

(a) he did not receive any amount ;

(b) the confirmation of the balance in the letter was inserted later on. The defendant No. 1 signed the receipt dated 9-9-47 at th instance of his brother;

(c) the suit was time -barred.

He denied his liability to pay the amount due on the current and overdraft account.

The *defendants 3 and 4 in their Written Statement* showed ignorance about the transactions which their father had with the Bank. They stated that—

(a) whatever is written in the letter of 4-1-49 was false. Neither the third defendant spoke to the Manager of the Bank nor has he given any writing;

(b) the suit was time barred.

Upon the above pleadings the following issues arise which the Court may frame :—

1. Did the defendant no. 1 and his brother jointly open a Current Account with the plaintiff and receive the amounts to the extent of Rs. 53,341/- and Rs. 1615/- till September 9, 1947 and did they admit in writing the dues against them as alleged ?

2. Was there any contract of interest at the rate of one per cent. per mensem ?

3. Did the defendant No. 3 admit the debt in his writing dated 4-1-1949 (Exhibit No. 1) ?

4. Is the writing regarding the confirmation of the balance added without knowledge of the defendants after his signature ?

If so what is its effect ?

5. Is the suit barred by limitation ?

6. Is the suit not maintainable against defendant No. 1 as he is a Military servant ?

7. To what relief is the plaintiff entitled ?

Omissions to frame issue.—Where there was no specific plea that the plaintiff's predecessors had, at some time in the past, migrated from any State or region where the Bombay School of Hindu Law was in force or that they had carried with them their personal law, and, therefore, no issue was framed on this particular aspect of the matter, even so it may well be regarded as covered by the general issue whether the parties are governed by the Bombay School of Hindu Law. The point is that both parties fully knew and understood what the real issue was and also led evidence in support of their contentions. That being so, none of them can be regarded as having been taken by surprise or prejudiced in any manner. In this situation, there was even in the absence of a specific issue on the point, no mis-trial such as might

vitiate the decision. (*Nagubai Ammal* v. *B. Shama Rao*, A. I. R. 1956 S. C. 593 : 1956 S. C. R. 451 ; *Kamesharamma* v. *Subba Rao*, A .1. R. 1963 S. C. 884 : (1963) 2 S. C. J. 113 : (1963) 2 S. C. R. 208 : (1963) 2 M. L. J. (S. C.) 49 : (1963) 2 Andh. W. R. (S. C.) 49 ; *Kunju Kesavan* v. *M. M. Philip*, A. I. R. 1964 S. C. 164 : (1964) 3 S. C. R. 634 : (1963) 2 S. C. W. R. 275 : (1963) 2 Ker. L. R. 238 : 196 Ker. L. J. 962).

Indeed, even when there is no specific plea but the matter is covered by an issue by implication and the parties go to trial with full knowledge that the plea is involved in the trial and adduce evidence thereon, the absence of the plea is a mere irregularity which did not cause any prejudice to the parties. (*Nagubai Ammal* v. *B. Shama Rao*, A. I. R. 1956 S. C. 593 ; *Bhagwati Prasad* v. *Chandramaul*, A. I. R. 1966 S. C. 735 : (1967) 1 S. C. J. 666 : (1966) 2 S. C. R. 286 : 1966 S. C. D. 888 : 1966 A. L. J. 799 : 1966 A. W. R. 609).

In *Bhagwati Prasad's case* (A. I. R. 1966 S. C. 735), the Supreme Court observed :

"If a plea is not specifically made and yet it is covered by an issue by implication and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings, would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence.

The general rule, no doubt, is that the relief should be founded on pleadings made by the parties. But where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely, in the issues and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case."

Where the question of validity of notice is definitely pleaded by the, defendant in his written statement, the courts below can rightly go into ite although no specific issue is framed in the suit, and can discuss this issue whilo discussing issue regarding the maintainability of the suit, and therefore, nd objection can be taken by the plaintiff on this technical ground in a secon. appeal. (*Kali Kumar Sen* v. *Haridas Roy*, A. I. R. 1969 Ass. & Naga. 134 (S. J.))

Where the parties to a suit are agreed.—As to the question of fact or of law to be decided between them they may state the same in the form of an issue, and enter into an agreement in writing that, upon the finding of the Court in the affirmative or the negative of such issue,—

(a) a sum of money specified in the agreement or to be ascertained by the Court, or in such manner as the Court may direct, shall be paid by one of the parties to the other of them, or that one of them be declared entitled to some right or subject to some liability specified in the agreement ;

(b) some property specified in the agreement and in dispute in the suit shall be delivered by one of the parties to the other of them, or as that other may direct ; or

(c) one or more of the parties shall do or abstain from doing some particular act specified in the agreement and relating to the matter in dispute. (O. 14, R. 6).

Questions of law cannot be, or at least ought not to be, decided by concession of counsel. (*Per* Chakravartti, C. J., in *Sohanlal Nagarmull* v. *Manicklal Seal*, A. I. R. 1954 Cal. 352...58 C. W. N. 313 ; *Per* Mukherjea, J. in *Modi Vanaspati Manufacturing Company* v. *Katihar Jute Mill Private Limited*, A. I. R. 1969 Cal. 496 (D. B.).

Where the Court is satisfied, after making such inquiry as it deems proper—

(a) that the agreement was duly executed by the parties,

(b) that they have a substantial interest in the decision of such question as aforesaid ; and,

(c) that the same is fit to be tried and decided,

it shall proceed to record and try the issue and state its finding or decision thereon in the same manner as if the issue had been framed by the Court ;

and shall upon the finding or decision on such issue, pronounce judgment according to the terms of the agreement ; and, upon the judgment so pronounced, a decree shall follow. (O. 14, R. 7).

The Court may frame the issues from all or any of the following *materials*:—

(a) allegations made—

(i) on oath by the parties or by any persons present on their behalf, or

(ii) by the pleaders of such parties ;

(b) allegations made—

(i) in the pleadings ; or

(ii) in answer to interrogatories delivered in the suit;

(c) the contents of documents produced by either party. (O. 14, R. 3).

Where the court is of opinion that the issues cannot be correctly framed without—

(a) the examination of some persons not before the court ; or

(b) the inspection of some documents not produced in the suit, it may—

(a) adjourn the framing of the issues to a future day ; and

(b) subject to any law in force, compel the attendance of any person or the production of any document by the person in whose possession or power it is, by summons or other process. (O. 14, R. 4).

In other words, when the Court is of opinion that from the pleadings of the parties to a suit and from the examination of the parties, issues cannot be properly framed, it may order the examination of the witnesses before framing the issues.

Trial of Issues.—Where—

(a) issues both of law and of fact arise in the same suit ; and

(b) the court is of opinion that the case or any part thereof may be disposed of on the issues of law only,

it shall try those issues first, and, for that purpose, may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined. (O. 14, R. 2).

It is well known that the suit must be tried as a whole and not piecemeal unless it involves the question of jurisdiction. For instance, if the valuation of the suit be such that it will oust the jurisdiction of the court before whom it was instituted, then, in such cases, ordinarily, this issue should be tried as a *preliminary issue* to prevent unnecessary harassment to the litigants. But in all other matters, it is always desirable that the cases should be tried as a whole, so that it would not be remanded times without number from the appellate court to re-examine other matters left undecided. (*Ram Saraf* v. *Mani Dei*, A. I. R. 1969 Orissa 295 (S. J.) : 35 Cut. L. T. 602).

It was *held* by the Patna High Court that—

1. No elaborate enquiry will be necessary for the purpose of determining the question as to whether the plaintiff was or was not a registered firm on the date of institution of the suit as contemplated by Section 69 (2) of the Partnership Act, 1932.

2. Such an enquiry ought not to be postponed for being taken up along with other questions of fact or law over which the parties may be at issue in the suit.

3. The question which will be necessary for determining the issue of maintainability of the suit will involve an enquiry into the facts which will be entirely distinct from the question which fall for determination of the cases of the parties on merits.

4. Therefore, in the ends of justice, the question of maintainability of the suit ought to be tried as a preliminary issue. The decision of the court below not to take up this issue as a preliminary issue for trial on the mere ground that it is linked up with certain questions of fact, does not represent a sound exercise of discretion in accordance with the principles of justice and fair play.

5. A question as to whether a suit is or is not barred by reason of Section 69 of the said Act, will require some materials to be brought on the record in the shape of public documents and the registered deed of partnership, but the determination of this issue as a preliminary issue cannot be refused merely on the ground that certain documents will have to be exhibited for the purpose. (*Messrs. K. C. Bishwas & Sons* v. *Central Alkusa Colliery Co.*, A. I. R. 1973 Pat. 184).

Amendment of Issues.—The court may, at any time before passing a decree, amend the issues or frame additional issues on such terms as it thinks fit.

Such amendments or additional issues as may be necessary for determining the matters in controversy between the parties are so made or framed. (O. 14, R. 5 (1)).

Where—

(a) on the pleadings, no issue arises as to the question whether there was a valid notice or waiver of that notice ; and

(b) before the defendant asks for framing of the additional issue, he has not filed any application for amendment of the written statement raising the additional plea,

it was *held* that, in the absence of amendment to the written statement, no plea can arise in this matter and, therefore, the additional issue framed by the trial court is not called for. (*C. A. Khaja Mohidden Sahib* v. *The Madras State Wakf Board*, A. I. R. 1973 Mad. 104 (S. J.)=(1972) 2 M. L. J. 222=85 Mad. L. W. 536).

Striking out of Issues.—The court may, at any time before passing a decree, strike out any issues that appear to it to be wrongly framed or introduced. (O. 14, R. 5 (2)).

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CHAPTER XI

SUITS BY PAUPERS

Who can institute suit *in forma pauperis*.—An suit may be instituted by a pauper. (O. 33, R. 1).

Meaning of pauper.—A person is a "pauper" when he is—

(a) not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in the suit ; or

(b) where no such fee is prescribed, not entitled to property worth Rs. 100 other than his necessary wearing-apparel and the subject-matter of the suit. (O. 33, R. 1, Explanation).

Explanation (ii) to Order 33, rule 1 (as added by the Madras High Court) states that any part of the subject matter of the suit which the opposite party relinquishes and places at the immediate disposal of the plaintiff shall be taken into account in considering the question of the possession of sufficient means of the plaintiff.

It would, indeed, be most dangerous and it would throw the door open to all sorts of speculative litigation if a mere endorsee for collection or an agent suing on behalf of a principal is permitted to sue as a pauper on the ground of his poverty, notwithstanding the fact that the original payee or the principal can well afford to pay court-fee. The object of the provisions or Order 33 is to help bona fide litigants who, stricken by poverty, are unable to pay the requisite court-fee. The object is certainly not to help persons set up by others for the purpose of avoiding the payment of court-fee. It may be that an endorsee for collection is entitled to bring a suit in his own name, but, since he possesses no beneficial interest in the subject-matter of the suit and the fruits of any decree which he may obtain are intended to benefit someone else, he should not be permitted to sue as a pauper. It is obvious that the endorsement for collection is a mere ruse for avoiding payment of court-fee.

The non-appearance of the defendant at the stage of deciding the question whether the petitioners (the plaintiffs) can be permitted to sue in forma pauperis, does not lead to any inference that the defendant has no defence with regard to the claim of the petitioners in respect of the schedule properties. It is open to the defendant, if he so advised, to contend in the suit that the claim of the petitioners in respect of those properties is not available or valid. Therefore, merely because the defendant has not appeared at this stage, the court cannot come to the conclusion that the properties fall within the scope of Explanation (ii) to Order 33, rule 1 as amended by the Madras High Court. This Explanation makes it clear that the opposite party must relinquish and place at the immediate disposal of the plaintiff the property concerned. It cannot be said that merely because the defendant has failed to appear at this stage, he has relinquished his claim, if any, in those properties and placed the same at the immediate disposal of the petitioners.

Whether any property should be taken into account for the purpose of granting or refusing permission to sue in forma pauperis, or not, will depend on whether it falls within the scope of Explanation (i) or Explanation (ii) to rule 1 of Order 33. The Explanation (b) (or Explanation (i) (b) as amended

by the Madras High Court) makes it clear that the property which is the subject matter of the suit, cannot be taken into account, and the question of taking into account any property will arise only when the property falls within the scope of Explanation (ii).

Conversion of ordinary suit into pauper suit.—There is no restriction in the power of the Court to allow a case not instituted as a pauper suit, to be continued as a pauper suit on proper application made by the plaintiff subsequently in accordance with law.

The case of *Mohammad Fateh Nasib* v. *Saradindu Mukherjee*, A. I. R. 1936 Cal. 221 (D. B.) : 40 C. W. N. 747, is an authority for the proposition that where a suit has been registered as an ordinary suit and the plaintiff does not pay deficit Court-fee and he subsequently applies for permission to continue the suit as a pauper, the application should not be rejected merely on the ground that the suit has been registered as an ordinary suit. (*See* also *Parvathi Ammal* v. *Meenakshi Ammal*, A. I. R. 1951 Mad. 841 : (951) 1 M. L. J. 446 ; *A. V.Krishnappa Reddi* v. *Venkatappa Reddy*, A. I. R. 1954 Mys. 148 : I. L. R. (1054) Mys. 98).

In the case of *Surendra Chandra Roy* v. *Showdamini Roy*, A. I. R. 1933 Cal. 238 (D. B.) : 56 Cal. L. J. 148, the plaintiff had instituted the suit on payment of Court-fee which was found to be insufficient. The plaintiff was then given time to pay the deficit court-fee. On the last date, the plaintiff prayed to be allowed to continue the suit as a pauper. The Court thereupon allowed the continuation of the suit as a pauper. It was *held* that—

(a) he power to allow a suit not instituted as a pauper suit to be continued as a pauper suit is included in the power given to the Court to allow a suit *in forma pauperis*.

(b) The order of the Court below is quite proper.

In the case of *Selina Sheehan* v *Mohammad Fateh Nasib*, A. I. R. 1932 Cal. 685 : 36 Cal. W. N. 567, it was observed :

"There is no machinery in Order 33, C. P. C., for dealing with circumstances which would oust when, after a suit has once been started, particularly after a suit has been partly heard, the plaintiff suddenly finds himself for financial reasons, no longer able to continue the suit in the ordinary way but seeks to continue the suit as a pauper.

However, Order 7, Rule 11 is sufficient for our present purpose and, in the circumstances of this case, we are of opinion that the learned Subordinate Judge ought to have dealt with the matter under the provisions of Order 7, Rule 11."

In *Mohammad Fateh Nasib's Case*, (A. I. R. 1936 Cal. 221), the above observation of Costello, J., was considered and it was held to be obiter dictum. Further the *Selnia Sheehan's Case* (A. I. R. 1932 Cal. 685), was distinguished in the Division Bench case of *Surendra Chandra Roy* v. *Showdamini Roy*, (A. I. R. 1933 Cal. 238).

Contents of application for permission to sue as a pauper.—Every application for permission to sue as a pauper contains the particulars required in regard to plaints in suits.

A Schedule of any movable or immovable property belonging to the applicant, with the estimated value thereof, is annexed to the application.

The application is signed and verified in the manner prescribed for the signing and verification of pleadings. (Order 33, R. 2).

Presentation of the application.—The application shall be presented to the Court *by the applica nt in person*,

unless he is exempted from appearing in Court, in which case the application may be presented *by an authorized agent* who—

(a) can answer all material questions relating to the application ; and

(b) may be examined in the same manner as the party represented by him might have been examined had such party attended in person. (O. 33, R. 3).

Date of institution of suit by pauper.—Section 26 of the Code of Civil Procedure lays down that every suit be instituted—

(a) by the presentation of a plaint ; or

(b) in such other manner as may be *prescribed.*

The word 'prescribed' means prescribed by Rules. (Section 2 (16), C. P. C.).

Order 4, Rule 1 of the Code of Civil Procedure runs as under :—

"(1) Every suit shall be instituted by presenting a plaint to the Court or such officer as it appoints in this behalf.

(2) Every plaint shall comply with the *rules* contained in Orders VI and VII, so far as they are applicable."

The First Schedule of the Code of Civil Procedure contains all these Orders which are in the nature of rules.

The word "rules" means rules and forms—

(a) contained in the First Schedule ; or

(b) made under Section 122 or Section 125. (Section 2 (18) C. P. C.).

Now, again, it appears from section 26, C. P. C., that a suit shall be instituted—

(a) by presentation of the plaint ; or

(b) in such *other manner* as may be prescribe l by the rules, meaning thereby rules contained in the First Schedule of the Code.

This other manner has been prescribed in Order 33 of the Civil Procedure Code.

Therefore, the suit can be said to have been instituted on the dat e the application was filed to allow the applicant to file a suit in *forma pauperis.* No doubt, in view of Order 33, Rule 8, that application will be deemed to be the plaint when the application is granted and that application will be numbered and registered and be proceeded further as a suit instituted in ordinary manner thereafter, but it cannot be said that the suit is instituted only when the application to file a suit in *forma pauperis* is granted. In the eye of law, the suit is instituted on the date of filing of the application to file a suit in *forma puperis*.

In the case of *Channulal* v. *Sharma*, A. I. R. 1955 Nag. 259 (DB) : I.L.R. (1955) Nag. 922, it was observed that—

(i) A suit commences for the purposes of Order 33, Rule 1 read with Section 26, C. P. C., with the making of an application for permission to sue in *forma puperis.*

(ii) In other words, from the moment of presentation of that application, there is a plaint *plus* an application for permission to sue in *forma pauperis*.

While the enquiry into pauperism is continuing, there is nothing in Order 33 which inhibits the Court from granting an injunction.

(iii) The purport of Order 33 is to enable a pauper to bring a suit without payment of court-fee, subject to his establishing that he is a pauper.

If he succeeds in establishing that he is a pauper, he is to be allowed to continue the suit, with the application deemed to be a plaint presented on the date on which the application was made.

If he fails to establish his pauperism, he is relegated to the same position in which any ordinary litigant would be if he brought his suit on a plaint insufficiently stamped.

(iv) It follows that, during the time the pauperism is being enquired into, there is a plaint but insufficiently stamped. When the pauperism is established, it is a plaint but without any such defect. (*See* also *Totaram* v. *Dattu*, A. I. R. 1943 Bom. 143 (DB) : I. L. R. (1943) Bom. 138).

The Supreme Court also in the case of *Vijai Pratap* v. *Dukh Haran Nath*, A. I. R. 1962 S. C. 941 : (1962) 2 S. C. R. (Supp.) 675 : 1962 A. L. J. 634, has made the following observations :—

"An application to sue in *forma pauperis* is but a method prescribed by the code for institution of a suit by a pauper without payment of fees prescribed by the Court Fees Act.

If the claim made by the applicant that he is a pauper, is not established, the application may fail. But there is nothing personal in such application.

The suit commences from the moment an application for permission to sue in *forma pauperis* as required by Order 33 is presented, and Order 1, Rule 10 would be as much applicable in such a suit as in a suit in which court-fee had been duly paid."

Amendment of application for permission to sue in *forma pauperis*.— The powers of court under Order 6, Rule 17, C. P. C., are not exhaustive, and the court has jurisdiction to allow an amendment to be made in an application to sue as pauper. (*Bihari Sahu* v. *Mt. Sudama Kuer*, A. I. R. 1938 Pat. 209 : 19 Pat. L. T. 101).

The contention that till the application is granted, there is no existence of a suit, cannot be accepted. Taking into consideration the provisions of section 141, C. P. C. and other relevant provisions of the code, even before the stage of granting of an application is reached, such an application filed by a pauper can be allowed to be amended. A relief can also be allowed to be deleted or withdrawn.

Therefore where the subject-matter of the suit is within the pecuniary jurisdiction of the court and the court has jurisdiction to grant the relief against the person but has no jurisdiction to grant the relief of keeping a charge over the immovable and movable properties because properties are situated outside the territorial jurisdiction of the court, the court has jurisdiction to permit the amendment of the plaint or to permit the withdrawal of one of the reliefs.

Objection as to jurisdiction.—In the case of *Periyasami Padayachi* v. *Ulaganathan*, A. I. R. 1949 Mad. 162 (S. J.) : I. L. R. (1949) Mad. 333, it was observed that—

(i) An application under Order 33, Rule 1, is a composite document consisting of a plaint and an application for being excused from the payment of court-fee.

(ii) When such a petition is presented and objection as to the pecuniary jurisdiction is raised in limine, it is the duty of the court to go into that question.

It is the imperative duty of a court, when a preliminary objection as to jurisdiction is taken, to decide that question at the earliest stage of the trial as a determination of that question is preliminary to his authority to entertain the matter or to make any further enquiry into it.

(iii) It must be laid down as a fundamental principle of justice that every court trying civil causes has inherent jurisdiction to take cognizance of questions which cut at the root of the subject-matter of controversy between the parties, and a question as to the territorial or pecuniary jurisdiction of a court to entertain a matter, is a question which cuts at the root of the subject-matter of controversy.

In the case of *M/s. Prem Singh* v. *Sat Ram Das*, A. I. R. 1958 Punj. 52 (S. J.) : I. L. R. (1957) Punj. 1555, it was observed that—

(i) It is not correct to say that the provisions of Rule 10, Order 7 apply only to plaints and an application under Order 33, Rule 1 cannot be regarded as a plaint unless and until it ripens into one on the application being granted.

(ii) By virtue of section 141, an application under Order 33, Rule 1 is in fact a plaint coupled with a prayer to be allowed to sue without payment of the required court-fee.

(iii) Therefore, subject to the provisions of Order 33, Rule 5, it is within the competence of the court to whom an application to sue in forma pauperis is presented, to determine the preliminary question of jurisdiction.

Appointment of Commissioner after filing application for permission to sue as pauper.—On the presentation of the petition to sue as a pauper, the suit is to be deemed to have been instituted and, therefore, there must be parties. The parties are those persons cited in the copy of the plaint filed with the petition. Hence, where an application for appointment of Commissioner is made after the filing of a petition for leave to sue in *forma pauperis* and before leave has been granted as prayed for in that petition, the applicant is entitled to the relief of appointment of Commissioner. (*Chidambaram* v. *Nataraja*, A. I. R. 1939 Mad. 80 : I. L. R. (1938) Mad. 1060).

Examination of applicant.—(1) Where the application is in proper form and duly presented, the Court may, if it thinks fit, examine the applicant or his agent when the applicant is allowed to appear by agent, regarding the merits of the claim and the property of the applicant

(2) Where the application is presented by an agent, the Court may, if it thinks fit, order that the applicant be examined by a commission in the manner in which the examination of an absent witness may be taken. (O. 33, R. 4).

Rejection of application.—The Court shall reject an application for permission to sue as a pauper—

(a) where it is not framed and presented in the manner prescribed by rules 2 and 3, or

(b) where the applicant is not a pauper, or

(c) where he has, within two months next before the presentation of the application, disposed of any property fraudulently or in order to be able to apply for permission to sue as a pauper, or

(d) where his allegations do not show a cause of action, or

(e) where he has entered into any agreement with reference to the subject-matter of the proposed suit under which any other person has obtained an interest in such subject-matter. (O. 33, R. 5).

Clause (d).—Dismissal of application for permission to file suit as pauper on the ground that *prima facie* the applicant has no cause of action.—It is true that, under Rule 6 of Order 33, the court is bound to admit evidence dealing with any of the questions that may be raised under Rule 5 ; but Rule 6 cannot have the effect of altering the meaning of Rule 5 (d). So whatever evidence may be let in, the court must consider whether there is a cause of action or not only upon the allegations in the plaint together with the documents referred to in it. (*Subramania Pillai* v. *Kuunnappa Goundan*, A. I. R. 1943 Mad. 663 : (1943) 2 M. L. J. 177). By the express terms of Rule 5, clause (d), the court is concerned to ascertain whether the allegations made in the petition show a cause of action. The court has not to see whether the claim made by the petitioner is likely to succeed ; it has merely to satisfy itself that the allegations made in the petition, if accepted as true, would entitle the petitioner to the relief he claims. The jurisdiction does not extend to trial of issues which must fairly be left for decision at the hearing of the suit. (*Vijaya Pratap Singh* v. *Dukh Haran Nath Singh*, A. I. R. 1962 S. C. 941 : (1962) 2 S. C. R. (Supp.) 675).

It is true that Order 33, rules 6 and 7 provide that even where the court itself does not reject the application under Order 33, Rule 5, it can still reject the application on the grounds mentioned in O. 33, R. 5 after enquiry in the presence of the opposite party to the application. But, even after the enquiry, the criterion to be satisfied is Order 33, Rule 5 (d) and, for this purpose, it is only the allegations in the application which must be taken into account. (*Satyavel* v. *Kota Ranga Ramanujiah*, A. I. R. 1969 Mad. 434 S. J.)).

The allegations that are to be taken into account in deciding whether a cause of action is disclosed or not, are the allegations in the application for permission to sue as pauper. (*Sattu Koteswaramma* v. *Sattu Subrahmanyam*, A. I. R. 1973 Andh. Pra. 196=(1972) 2 Andh. L. T. 178).

Clause (d-1).—In Andhra Pradesh, under Rule 5 (d-1) of Order 33, the Court shall reject an application for permission to sue as a pauper where the suit appears to be barred by any law.

Where—

(a) the only contention is that the decision in the prior suit operates as a bar on the principle of res judicata ; and

(b) it is not disclosed by any averment in the petition for permission to sue as pauper that—

(i) there was a prior suit and

(ii) there was a decision therein with regard to the subject-matter of the present petition, and

(c) that is a matter pleaded in defence by the respondent,

it was held that—

1. To determine whether the suit is barred by any law, the Court has to confine itself to the allegations in the petition and not to canvass the allegations in the respondent's counter made as a defence to the petitioner's claim.

2. It is one thing to say that the suit is barred by law and a totally different thing to contend that the plaintiff's suit, although maintainable, no relief can be granted.

3. An enquiry into the question whether the plaintiff is entitled to the relief claimed having regard to the plea of res judicata raised by the respondent is beyond the scope of the enquiry of a petition under Order 33, Rule 5. (*Sattu Koteswaramma* v. *Sattu Subrahmanyam*, A. I. R. 1973 Andh. P.a. 196).

Notice of day for receiving evidence of applicant's pauperism.—Where the Court sees no reason to reject the application on any of the grounds stated in rule 5, it shall fix a day (of which at least ten days' clear notice shall be given to the opposite party and the Government pleader) for receiving such evidence as the applicant may adduce in proof of his pauperism, and for hearing any evidence which may be adduced in disproof thereof. (O. 33, R. 6).

Procedure at hearing.—(1) On the day so fixed or as soon thereafter as may be convenient, the Court shall examine the witnesses (if any) produced by either party, and may examine the applicant or his agent, and shall make a memorandum of the substance of their evidence.

(2) The Court shall also hear any argument which the parties may desire to offer on the question whether, on the face of the application and of the evidence (if any) taken by the Court as herein provided, the applicant is or is not subject to any of the prohibitions specified in rule 5.

(3) The Court shall then either allow or refuse to allow the applicant to sue as a pauper. (O. 33, R. 7).

Procedure if application admitted.—Where the application is granted, it shall be numbered and registered, and shall be deemed the plaint in the suit, and the suit shall proceed in all other respects as a suit instituted in the ordinary manner, except that, the plaintiff shall not be liable to pay any court-fee (other than fees payable for service of process) in respect of any petition, appointment of a pleader or other proceeding connected with the suit. (O. 33, R. 8).

The provisions of this Rule 8 indicate that—

(a) Till the application is granted, the application may not be equated with the plaint ;

(b) It is only when the application is granted, it is deemed to be a plaint in the suit.

The words "in the suit" in this Rule must be given their proper importance. If there is no institution of the suit on the date an application to permit the filing of a suit in *forma pauperis* is given, it does not stand to reason as to how it can be said that this particular document which is deemed to be a plaint when the application is granted, is a plaint in the suit.

Furthermore, the latter part of the Rule, namely, the suit shall *proceed* in all other respects as a suit instituted in the ordinary manner, has its own significance. The word 'proceed' has also a significance. It means that a suit was already filed and, after this application is granted, it has to proceed. The stage of proceeding will be reached after a suit is filed or instituted.

On account of the introduction of the deeming fiction after the application is granted, that the application shall be deemed to be the plaint, it can be said that the suit has been instituted in an ordinary manner. But it does not mean that till then the suit was not instituted, but it can only be said that the suit was not instituted in an ordinary manner till then and this cannot be done as section 5 of the Bombay Court-fees Act lays down that a plaint cannot be filed or exhibited in any Court of Justice as it is chargeable to duty of court-fees. This is the reason why this other manner has been prescribed in section 26, C. P. C. By prescribing the other manner, the suit can be said to have been validly instituted.

Dispaupering.—The Court may, on the application of the defendant, or of the Government pleader, of which seven days' clear notice in writing has been given to the plaintiff, order the plaintiff to be dispaupered—

(a) if he is guilty of vexatious or improper conduct in the course of the suit ;

(b) if it appears that his means are such he ought not to continue to sue as a pauper ; or

(c) if he has entered into any agreement with reference to the subject-matter of the suit under which any other person has obtained an interest in such subject-matter. (O. 33, R. 9).

Costs where pauper succeeds.—Where the plaintiff succeeds in the suit, the Court shall calculate the amount of court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper ; such amount shall be recoverable by the State Government from any party ordered by the decree to pay the same, and shall be a first charge on the subject matter of the suit. (O. 33, R. 10).

It is not correct to read Rule 10 of Order 33 as applicable only to cases where the direction for payment of court-fees is contained in a decree. Rule 14 of Order 33 shows that the direction to pay court-fees can be by an order as well. And in cases where there is remand in appeal without deciding any question, there will be only an order of remand and no decree. It is too far-fetched to construe Rule 10 as inapplicable in such cases because there is only a direction in an order in such cases for payment of court-fees. Rule 10 provides for such cases also. (*Nelliyodan Balan Nair* v. *Pantheeyati Kesavan Nambissan*, A. I. R. 1973 Ker. 133 (D. B.)=1973 Ker. L. J. 97=1973 Ker. L. R. 138=1973 Ker. L. T. 280).

The word 'decree' in Rule 10 has to be understood in the context as not

a decree as defined in the Code of Civil Procedure but as only containing the final decision of the Court directing the payment of court-fees. (*ibid*).

Procedure where pauper fails.—Where the plaintiff fails in the suit or is dispaupered, or where the suit is withdrawn or dismissed—

(a) because the summons for the defendant to appear and answer has not been served upon him in consequence of the failure of the plaintiff to pay the court-fee or postal charges (if any) chargeable for such service, or

(b) because the plaintiff does not appear when the suit is called on for hearing, the Court shall order the plaintiff or any person added as a co-palintiff to the suit, to pay the court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper. (O. 33, R. 11).

In rule 10, there is a direction that the court shall calculate the amount of Court-fees which would have been paid by the plaintiff. It is true that there is such mention about the calculation in rule 11, because it is mentioned there the Court shall order any plaintiff or any person as a co-plaintiff to the suit, to pay the court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper. In my opinion, rule 11 has to be read along with the provisions regarding the calculation contained in rule 10 and it could never have been the intention of the Code that there should be a calculation where a pauper succeeds but no such calculation is to be made where the pauper fails because obviously in both cases the amount which is payable as court-fees has to be ascertained with regard to the plaint and then also with regard to such court-fees as would be payable under rule 8. Further, rules 10 and 11 should be read along with rule 14.

Procedure where pauper suit abates.—Where the suit abates by reason of the death of the plaintiff or of any person added as a co-plaintiff, the Court shall order that the amount of court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pauper shall be recoverable by the State Government from the estate of the deceased plaintiff. (O. 33, R. 11-A).

State Government may apply for payment of court-fees.—The State Government shall have the right at any time to apply to the Court to make an order for the payment of court-fees under rule 10, rule 11 or rule 11-A. (O. 33, R. 12).

All matters arising between the State Government and any party to the suit under rule 10, rule 11, rule 11-A or rule 12 shall be deemed to be questions arising between the parties to the suit within the meaning of section 47. (O. 33, R. 13).

Where an order is made under rule 10, rule 11 or rule 11-A, the Court shall forthwith cause a copy of the decree or order to be forwarded to the Collector who may, without prejudice to any other mode of recovery, recover the amount of court-fees specified therein from the person or property liable for the payment as if it were an arrear of land revenue. (O. 33, R. 14).

The important words to be noticed in rule 14 are that the copy of the decree should contain the amount of court-fees specified therein, and this clearly means that the specific amount should be mentioned. If there is no

calculation and no amount mentioned in the decree, then the decree is vague and as such not executable without amendment of the decree. (*State of Bihar* v. *Sheokumar Sinha*. A. I. R. 1969 Pat. 359 (D B.) : 1960 B. L. J. R. 299 : 1969 Pat. L. J. R. 132).

The executing court cannot amend the decree. The proper court to which a petition for amendment of the decree can be filed, is the court which has passed the decree. So it would be beyond the scope and power of the executing court to go behind the decree by looking into the relevant papers and materials on record and calculating as to how the court-fee is payable. (*ibid*).

Rule 14 lays down that the Collector may, without prejudice to any other mode of recovery, recover the amount of court-fees specified therein from the person or property liable for the payment as if it were an arrear of land revenue. This gives the Collector an option either to proceed under the Public Demands Recovery Act for the realisation or to file an execution petition for the execution of the decree under the ordinary procedure. (*ibid*).

Refusal to allow applicant to sue as pauper to bar subsequent application of like nature.—An order raising to allow the applicant to sue as a pauper shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue ; but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right provided that he first pays the costs (if any) incurred by the State Government and by the opposite party in opposing the application for leave to sue as a pauper. (O. 33, R. 15).

A perusal of this rule indicates that even though an application to sue as a pauper has been rejected, the applicant is given a liberty to institute a suit in the ordinary manner. It also indicates that, in case of a pauper, the Legislature intended the institution of a suit in the manner other than institution of a suit by presentation of a plaint.

Costs.—The costs of an application for permission to sue as a pauper and of an inquiry into pauperism shall be costs in the suit. (O. 33, R. 16).

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CHAPTER XII

INTERPLEADER SUIT

Particulars in plaint in interpleader suit.—In every suit of interpleader, the plaint shall, *in addition to other statements necessary for plaints*, state—

(a) that the plaintiff claims no interest in the subject-matter in dispute other than for charges or costs;

(b) the calims made by the defendants severally; and

(c) that there is no collusion between the plaintiff and any of the defendants. (O. 35, R. 1).

Payment of thing Claimed into Court.—Where the thing claimed is capable of being paid into Court or placed in the custody of the Court the plaintiff may be required to so pay or place it before he can be entitled to any order in the suit. (O. 35, R. 2).

Procedure where defendant is suing plaintiff. -Where any of the defendants in an interpleader-suit is actually suing the plaintiff in respect of the subject-matter of such suit, the Court in which the suit against the plaintiff is pending shall, on being informed by the Court in which the interpleader-suit has been instituted, stay the proceedings as against him; and his costs in the suit so stayed may be provided for in such suit ; but if, and in so far as they are not provided for in that suit, they may be added to his costs incurred in the interpleader suit. (O. 35, R. 3).

Procedure at first hearing.—(1) At the first hearing the Court may—

(a) declare that the plaintiff is discharged from all liability to the defendants in respect of the thing claimed, award him his costs, and dismiss him from the suit, or

(b) if it thinks that justice or convenience so require, retain all parties until the final disposal of the suit.

(2) Where the Court finds that the admissions of the parties or other evidence enable it to do so, it may adjudicate the title to the thing claimed.

(3) Where the admission of the parties does not enable the Court so to adjudicate, it may direct—

(a) that an issue or issues between the parties be framed and tried, and

(b) that any claimant be made a plaintiff in lieu of or in addition to the original plaintiff.

and shall proceed to try the suit in the ordinary manner..(O. 35, R. 4).

Agents and tenants may not institute interpleader suits.—Nothing in this Order shall be deemed to enable agents to sue their principals, or tenants to sue their landlords, for the purpose of compelling them to inter-

plead with any persons other than persons making claim through such principals or landlords.

Illustrations

(a) A deposits a box of jewels with B as his agent. C alleges that the jewels were wrongfully obtained from him by A, and claims them from B. B cannot institute an interpleader suit against A and C.

(b) A deposits a box of jewels with B as his agent. He then writes to C for the purpose of making the jewels a security for a debt due from himself to C. A afterwards alleges that C's debt is satisfied, and C alleges the contrary. Both claim the jewels from B. B may institute an interpleader suit against A and C. (O. 35, R. 5).

Charge for plaintiff's costs.—Where the suit is properly instituted, the Court may provide for the costs of the original plaintiff by giving him a charge on the thing claimed or in some other effectual way. (O. 35, R. 6).

CHAPTER XIII

SUITS RELATING TO PUBLIC MATTERS

Public Charities.—1. In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or

2. Where the direction of the Court is deemed necessary for the administration of any such trust,

(i) the Advocate-General, or

(ii) two or more persons having—

1. an interest in the trust, and

2. obtained the consent in writing of the Advocate-General,

may institute a *suit* (whether contentious or not) in—

(i) the principal Civil Court of original jurisdiction, or

(ii) any other Court empowered in that behalf by the State Government within the local limits of whose jurisdiction the whole or any part of the subject-matter of the trust is situate,

to obtain a decree—

(a) removing any trustee ;

(b) appointing a new trustee ;

(c) vesting any property in a trustee ;

(cc) directing—

(i) a trustee who has been removed, or

(ii) a person who has ceased to be a trustee,

to deliver possession of any trust property in his possession to the person entitled to the possession of such property ;

(d) directing accounts and inquiries ;

(e) declaring what proportion of—

(i) the trust property or

(ii) the interest therein,

shall be allocated to any particular object of the trust ;

(f) authorizing the whole or any part of the trust property to be let, sold, mortgaged or exchanged ;

(g) settling a scheme ; or

(h) granting such further or other relief as the nature of the case may require. (Section 92 (1), C. P. C.).

Save as provided by—

(a) the Religious Endowments Act, 20 of 1863 ; or

(b) any corresponding law in force in a Part B State,

no suit claiming any of the reliefs specified in section 92 (1), C. P. C.,

shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section. (Section 92 (2), C. P. C.).

Section 92 of the Code of Civil Procedure has no application unless the following three conditions are fulfilled :—

(1) The suit must relate to a public charitable or religious trust ;

(2) The suit must be founded on an allegation of breach of trust or the dicertion of the Court is required for administration of the trust ; and

(3) The reliefs claimed are those which are mentioned in the section.

Meaning of 'Charity'.—The word 'charity', like many other words has both a lay meaning and a legal meaning. In the common use of the term 'charity' means any act of kindness or benevolence and it is usually defined as such by the lexicographers. Thus by the lay mind, it is, undoubtedly, considered an act of charity for one to aid another in the hour of sickness, distress or need. In law, such an act would amount to benevolence and not to charity. Another definition that has been frequently quoted by the courts, but which is broader than the true legal definition, is, that whatever is given for the the love of God or for the love of a neighbour in the catholic and universal sense—given from those motives and to these ends, free from the stain or taint of every consideration that is personal, or selfish—constitutes charity.

In legal parlance, the word "charity" has a much significance than in common speech. While a precise and complete definition is difficult to frame, the most comprehensive and carefully drawn definition is that it is a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons by influence of bringing their hearts under the education or religion by relieving their bodies from disease, suffering or constraint by assisting them to establish themselves for life or by erecting or maintaining public buildings, or works or to otherwise lessening the burdens of Government.

It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature. Another definition capable of being easily understood and applied is that given by *Lord Camden* as follows: "A gift to a general public use, which extends to the poor as well as the rich". The theory of this is that the immediate persons benefited may be of a particular class, and yet if the use is public in the sense that it promotes the general welfare in some way it has the essentials of a charity. The true test of a legal public charity is the object sought to be attained and not the motive of the donor in establishing the trust.

Again, charity has been declared to be active goodness—the doing good to our fellow men, fostering those institutions that are established to relieve pain, to prevent suffering and to do good to mankind in general or to any class or portion of mankind. General gifts for the relief of the poor and unfortunate persons are for a charitable purpose.

Charitable purposes take such varied forms that they cannot be limited by any narrow and stated formula and what is a charitable purpose also varies from time to time. A gift for a religious purpose is one for a charitable purpose. Religion and charity overlap each other and do not admit of any differentiation. They are both integral parts of Dharma or rule of righteousness which the Hindu sages regard as the upholder of the entire fabric of universe, both in its physical and moral aspects. It has been pointed out by

B. K. Mukherjee (Tagore Law Lectures) that flowing from the doctrine of Karma in the Hindu system, there is no line of demarcation between religi on and charity. On the other hand, charity is regarded as part of the religion.

Public and private trust.—Charitable trusts are of two kinds—public and private. The Hindu law itself knows no distinction between public and private religious or charitable trusts. (*Rupa* v. *Krishnaji*, ILR 9 Bom. 169). Hence West, J. remarked in general terms in *Manohar* v. *Laxmiram*, ILR 12 Bom. 247, that a trust for a Hindu Idol and temple is to be regarded in India as one created for public charitable purposes within the meaning of *S. 92 of the Code*. Still that distinction is not without its meaning in Hindu law as now administered.

In English law, the terms 'public' and 'private' are thus defined : By 'public' must be understood such as are constituted for the benefit either of the public at large or of some considerable portion of it answering a particular description. The essential elements of a public charity are that it is not confined to privileged individuals but it is open to the indefinite public or some portion thereof or upon an indefinite class of persons. It is this unrestricted quality that gives it its public character.

The line of distinction between purposes of a public and of a private nature is few and practically incapable of definition. To the class 'public' belong all trusts for charitable purposes and indeed 'public' trusts and 'charitable' trusts may be considered in general as synonymous expressions. In "private" trusts, the beneficial interest is vested absolutely, in one or more indviduals who are within a certain time, may be definitely ascertained and unless under some legal disability it is, or within the allowed time will be competent to control, modify, or determine the trust.

A public or charitable trust, on the other hand, has, for its object, the members of an uncertain and fluctuating body and the trust itself is of a permanent and indefinite character and is not confined within the limits prescribed to a settlement upon a private trust. The same distinction has been exprressed by Mr. G. S. Shastri in his Hindu Law at page 491. He says that when property is dedicated to charitable, education or religious uses for the benefit of an indeterminate body of persons, the endowment is a public one and when property is set apart for the worship of a deity of a particular family in which no outsider is interested, the endowment is a private one. It seems that it was with this distinction in view that the Privy Council held in a Calcutta case that in the case of a family idol the concensus of the whole family might give the estate another direction. (*Konwar Doorganath* v. *Ramchunder Sen*, ILR 2 Cal. 341 (P. C.).

This decision appears to have been followed in another case which went up to that High Court and approved in a somewhat analogous case by the Bombay High Court. These decisions are obviously based on the belief that the endowment in each case was a private one. Mr. Sastri has in view of the decisions gone so far as to assert that if all the member of the family to which an endowment belongs renounce Hinduism and choose to throw the family idol into the water of the Ganges and themselves enjoy its property, no outsider can raise any objection to that course.

The Allahabad High Court had, on the other hand, occasion to define what a public endowment was in the case of *Puran Atal* v. *Darshan*, ILR 34 All 468 : 9 All L. J. 709. Therein Chamier, J, remarked : "It seems beyond doubt that in order that a trust may be a trust for a public purpose, it is not

necessary that it should be a trust for the benefit of the public at large. It is sufficient to show that it is a trust for the benefit of a section of the public".

It was with some such definition of a 'public trust' in view that where a Hindu provided for the creation a d maintenance of a religious endowment in favour of the sect known as the Bhagwatas, appointing managers and directing the manner in which the profits of the endowed property were to be spent, the Calcutta High Court held that there was a public religious endowment within the meaning of S. 92 of the C. P. C., (*see Kanhayalal* v. *Shaligram*, 1894 All WN 159).

While distinguishing communal from religious trusts, West. J., says in I.L.R. 12 Bom. 247 at p. 259. "There is no difficulty in conceiving the existence of a society having property and receiving gifts from its own members or from strangers which it then disposes of simply for its own benefit or at its own discretion. The guilds, companies and manufacturing and trading societies held and still hold estates without the attendant obligations of a religious trust. The property is their own, distributable amongst the members, or at the pleasure of the governing body of the society not for the benefit of any class outside the society or for the promotion of any purpose of recognised public utility. The latter characteristic is essential to a public charity but in its absence there may be a corporation existing by royal grant, prescription or legal allowance holding property for other than charitable purposes." As a family example of a communal trust may be cited the fund held by the Mahajan for communal purposes. Such a fund was held in the case of *Thakersey* v. *Hurbhum*, ILR 8 Bom. 432 to be a purely secular fund and a suit with respect to such a fund was held not to fall within the purview of S. 92 of the Code.

The dictinction between public and private trusts is : The requisites of a valid private trust and of one for a charitable use are materially different. In the former, there must be not only a certain trustee who holds the legal title, but a certain specified 'cestui que trust' clearly identified, or made capable of identification, by the terms of the instruments creating the trust, while it is an essential feature of the latter that the beneficiaries are uncertain, a class of persons described in some general language, often fluctuating, changing in their individual members, and partaking of a quasi-public character.

The most important distinction, however, between charities and other trusts is that in the time or duration allowed and the degree of definiteness required. Trusts for public charitable purposes, being for objects of permanent interest and benefit to the public, and perhaps being perpetual in their duration are upheld under circumstances under which private trust would fail.

Representative Character.—In *Budreedas* v. *Choonilal*, [1906] I. L. R. 33 Cal. 789 at page 807 : 10 C. W. N. 581, Woodroffe, J., stated as follows :

"It is obvious that—

(a) the Advocate-General,
(b) the Collector, or
(c) other public officer,

can and do sue only as representing the public, and if, instead of these officers, two or more persons, having an interest in the trust, sue with their

consent, they sue under a warrant to represent the public as the objects of the trust.

It follows from this that when a person or persons sue not to establish the general rights of the public, of which they are a member or members, but to remedy a particular infringement of their own individual right, the suit is not within, or need not be brought under, the section 92."

This principle was accepted as sound by a Full Bench of the Madras High Court in *Appanna* v. *Narasingha*, A. I. R. 1922 Mad. 17 (F. B.) : I. L. R. 45 Mad. 113. In this Full Bench case, a suit was instituted by a trustee of a public religious trust against a co-trustee for accounts. The Full Bench decided that it did not come within Section 92, C. P. C., the claim being to enforce a purely personal right of the plaintiff as a trustee against his co-trustees. The same view was taken by the Madras High Court in *Tirumalai Tirupati Devasthanams Committee* v. *U. Krishnayya Shambhaga*, A. I. R. 1943 Mad. 466 (F. B.) : (1943) I. L. R. Mad. 619, where the general trustees of a public temple filed a suit against the trustees for the recovery of moneys which the latter had collected on behalf of the former praying for a decree directing accounts and inquiries. It was held that the right to collect moneys was entirely independent of Section 92 of the Civil Procedure Code and no sanction of the Advocate-General was necessary for the institution of the suit. Leach, C. J., who delivered the judgment of the Court, observed as follows :—

".....in deciding whether a suit falls within Section 92, the Court must—

(a) go beyond the reliefs ; and

(b) have regard to—

(i) the capacity in which the plaintiffs are suing, and

(ii) the purpose for which the suit is brought."

Problem.—Late Haji Elahi Bux had one son named Mohammad Shafi and had one daughter. One Haji Kummu who was a nephew of Haji Elahi Bux, married his daughter. The wife of Mohammad Shafi was Surga Bibi. Haji Elahi Bux carried on a shoe business under the name and style of "Mohd. Shafi Kammu Mian". He executed a wakf deed, dated 18th November, 1936, in respect of his property and appointed his son Mohammad Shafi and his son-in-law Haji Kummu as the joint Mutwallis. According to the terms of the Wakf Deed, on the death of a joint Mutwalli the survivor was to be the sole Mutwalli and had the power to nominate his suceessor from the family line of the settlor, and, in case the sole Mutwalli died without nominating his successor, the seniormost member among the lineal descendants of Mohammad Shafi and Kammu Mian, if otherwise competent, was entitled to hold the office of the Mutwalli. The *relevant provisions of the Wakf deed* are reproduced below :—

Whereas *Haji Elahi Bux*, son of late Madda Choudhury, of village Kokaram Bazar, Rae Bareily, at present residing at Bara Bazar Road, Shillong, (hereinafter called the *Settlor*), is the sole proprietor of the firm in Bara Bazar Road in the town of Shillong, known as 'Mohd. Shafi Kammu Mian',

together with all properties (movable or immovable) and all funds, investments and profits belonging and appertaining thereto, as well as of the properties in whomsoever's name standing described in the Schedule hereto.

And whereas the said Settlor is desirous that his said properties shall be permanently dedicated for—

(a) religious purposes, and

(b) the maintenance of his relations and descendants from generation to generation, and

(c) the poor and meritorious.

Now be it known that the said Settlor, by these presents, divests himself of the ownership of the said firm together with all properties movable and immovable and all funds, investments and profits belonging or appertaining thereto, as well as the properties described in the Schedule hereto,

all which shall henceforward vest absolutely in Almighty God for the purposes hereinafter specified, and shall constitute a Wakf Estate to be administered in the following manner :—

.....

(6) Out of the income of the Estate a sum of Rs. 500/- shall be annually spent for the maintenance and upkeep of Mosques and Madarsas and for helping the poor and needy.

(7) The Mutwalli shall give to Ali Mustaqe (Nanka), the Settlor's son by his nika wife Noju Bibi since divorced, a monthly allowance of Rs. 10/- or, in the alternative and at his option, a consolidated sum not exceeding Rs. 1,000/- (Rupees one thousand) but the sons and descendants of the said Ali Mustaque shall have no claim whatsoever against the estate for maintenance or any other purpose nor shall he or they have any right to the office of the Mutwalli.

(8) The Mutwalli shall be entitled to reasonable remuneration not exceeding Rs. 50 /- (fifty) per month.

.....

(11) Whatever remains after defraying the above expenses the Mutwalli shall be at liberty to spend for his own maintenance and the maintenance of the Settlor's family and descendants from generation to generation as provided in paragraph 10.

.....

(13) On the total extinction of the Settlor's family line, the whole income of the Estate, after defraying the expenses as provided for above, shall be spent for helping the poor and meritorious, and for promoting the cause of Muslim education in such manner as the Mutwalli, in his discretion, may determine.

(14) The Mutwalli shall have no power to sell or give away any portion of the Estate except for justifying legal necessity.

.....

(16) The Mutwalli shall have power, if funds permit, to make reasonable contributions to funds and institutions created or maintained for general charitable purposes.

And it is hereby further declared that all properties (movable and immovable) and all funds, investments and profits bought, created or made with money belonging to or accruing out of the estate, or in any manner appertaining thereto, shall —

(a) for all purposes, be annexed to the wakf by these presents founded and

(b) be administered and enjoyed in the same manner and be, in al respects, liable to the same incidents as the estate itself.

And be it known that the present market value of the properties included in the deed is Rs. 30,000/- (Rupees thirty thousand only).

In Witness whereof, I, Haji Elahi Bux, the settlor above-named, do hereby set my hand the eighteenth day of November, 1936.

Mohammad Shafi died on 20th December, 1960 and thereafter Haji Kummu became the sole surviving Mutwalli. Sugra Bibi, the widow of the deceased Mohammad Shafi, filed a suit on 7th July, 1961 against Haji Kummu for a declaration that—

(a) the defendant was unfit to continue as Mutwalli of the Wakf estate ; and

(b) he should be removed from the office of the Mutwalli ; and

(c) Sulaiman, the son of the plaintiff through Mohammad Shafi, be declared fit and be appointed as Mutwalli of the Wakf estate and, till he attained majority, a suitable Receiver should be appointed for the said Wakf estate.

No sanction of the Advocate-General was obtained under section 92, C. P. C. The question is whether the suit is maintainable in view of the provisions of section 92, C. P. C.

Solution.—Having examined the various clauses of the Wakf deed, it has to be held that from the mere fact that there are certain provisions in favour of the family members of the founder along with some other provisions in favour of the public, the case will not be taken out of the provisions of section 92, C. P. C. The reason is that there is a substantial portion of the income of the wakf properties to be spent for purposes of charitable and religious nature.

The proper test for holding whether the Wakf would fall within the purview of section 92, is to examine whether the Wakf has been created substantially for a public purpose. Applying the test to the present case, it has to be held that the Wakf deed created a public charitable or religious trust, and the Wakf created by Haji Elahi Bux falls within the purview of section 92.

This view is borne out by the decision of the Calcutta High Court in *Massirat Hossain* v. *Hassain Ahmad Chowdhury*, A. I. R. 1938 Cal. 597 (D. B.) : 42 C. W. N. 345. This Calcutta case related to a Wakf estate, the net annual income of which was about Rs. 1300/- and out of this, a sum of Rs. 353/- was set apart for public purposes of a charitable or religious nature. It was held that the amount by no means was a trifling or disproportionate provision in favour of the public and consequently the suit was maintainable under section 92.

In *Vaidya Nath Aiyyar* v. *Swaminatha Ayyar*, A. I. R. 1924 P. C. 221 : 51 I. A. 282, the founder of the trust directed by his will that two-thirds of the income of his property would go to his wife and the remaining one-third would go first towards the discharge of certain debts and thereafter to establish a Chatram for the feeding of the poor. There was a further provision that, after the wife's death, two-thirds of the income given to her would be applied to charity and one-third to the members of the family. On these facts, the

Judicial Committee of the rivy Council agreed with the findings of the court below that the Chatram so establish was a public trust.

It is true that the facts that—

(a) the present suit relates to public trust of a religious or charitable nature ; and

(b) the reliefs claimed in the suit fall within clauses (a) to (h) of Section 92 ( ), C. P. C.,

would not by themselves attract the operation of the Section, unless the suit is of a representative character instituted in the interests of the public and not merely for vindication of the individual or personal rights of the plaintiff.

In the present case, the suit brought by the plaintiff must be treated as a suit brought by her in a representative capacity on behalf of all the beneficiaries of the Wakf. The Wakf created by Haji Elahi Box was a Wakf created for a public purpose of charitable or religious nature. The reliefs claimed by the plaintiff in the suit are not reliefs for enforcing any private rights but reliefs for the removal of the defendant as trustee and for appointment of a new trustee in his place. The reliefs asked for by the plaintiff fall within clauses (a) and (b) of Section 92 (1) and these reliefs indicate that the suit was brought by the plaintiff not in an individual capacity but as representing all the beneficiaries of the Wakf estate.

In conclusion the present suit falls within the purview of the provisions of Section 92, Civil Procedure Code and, in the absence of the consent in writing of the Advocate-General, the suit is not maintainable.

Dedication for creation of Wakf.—It is well established that an express dedication is not necessary to create a wakf and that the dedication may be assumed from long user, if it is clear that the intention of the owners was to make the dedication. (*Mehar Din* v. *Hakim Ali*, A. I. R. 1935 Lah. 912 : 157 I. C. 516).

In *Motishah* v. *Abdul Gaffar Khan*, A. I. R. 1956 Nag. 38 : I. L. R. (1955) Nag. 1000, it was held that a wakf may be defined to mean the dedication of the corpus in the ownership of God in such a manner that its profits may be applied for the benefit of his servants. It was further held, that, as a general rule, all persons who are competent to make a valid gift, are also competent to constitute a valid wakf. Islam is not a necessary condition for the constitution of a wakf. Any person of whatever creed may create a wakf but the object for which dedication is to be made should be lawful according to the creed of the dedicator as well as the Islamic doctrines.

In *Khati* v. *Mirza Hossain Beg*, A. I. R. 1962 Ori. 95, it was held that—

(i) A wakf normally requires express dedication, but, if it had been used from time immemorial for religious purpose then the land is by user wakf though there is no evidence of express dedication. (*See* also *Mohammad Shah* v. *Fosihuddin Ansari*, A. I. R. 1956 S. C. 713).

(ii) When a long period has elapsed since the origin of the alleged wakf, user can be the only available evidence to show if the property is or is not wakf.

(iii) Where there is no evidence to show how and when the alleged wakf was created, the wakf may be established by evidence of user.

(iv) If the land had been used from time immemorial for religious purposes, such as Masjid, the land is constituted wakf, though there is no evidence of express dedication. The title of the original owner is extinguished and the ownership of the property vests in God and, accordingly, the public character of the institution may be presumed.

A wakf in respect of a burial ground may, in the absence of direct evidence of dedication, be established by evidence of user. But the user from which dedication can be implied, must be—

(a) clearly established, and

(b) of such a character as to be consistent with dedication—

Such user or dedication is required to be public user or dedication. Where the evidence shows no more than that certain persons were many years ago buried in the place, it does not amount to evidence of public user. (*K. Raushan Din* v. *H. Mohd. Sharif*, A. I. R. 1936 Lah. 87 : 161 I. C. 650).

Even an owner's unexpressed intention to dedicate property cannot have the effect of a formal dedication. In the absence of any such intention or declaration, no wakf can be said to have been created. It is true that a wakf can be created by user but that user too must be preceded by an intention on the part of the owner to create a wakf. If no such intention is established, user alone will not be sufficient to divest the property of its private character. (*Zafar Hussain* v. *Mohammad Ghiasuddin*, A. I. R. 1937 Lah. 552 : I. L. R. (1937) Lah. 276).

CHAPTER XIV

DRAFTED PLAINTS

(1)

Plaint in a suit for administration of estate of deceased by creditor on behalf of himself and other creditors

In the Court of Civil Judge, Allahabad

Suit No.....of.....1969

A, B, son of .....,aged.....,caste....., resident ,of... .....*Plaintiff*

versus

X, Y, son of....., aged.....,caste....., resident of.....*Defendant*

A, B, the above-named plaintiff, on behalf of himself and all other creditors, beg to state as follows :—

1. E. F., late of (address), was, at the time of his death, and his estate still is, indebted to the plaintiff in the sum of Rs. 4,000 with interest at one per cent. per annum under a promissory note dated 4-4-67, executed by him for cash consideration in full in favour of the plaintiff.

2. The said E. F., died on or about 4-8-67. By his last will dated 1-8-67, he appointed the defendant his sole executor.

3. The said will was proved by the defendant in the Court of District Judge, Allahabad, on 1-2-68.

4. The defendant has possessed himself of all the property, movable and immovable, of the said E. F. and has not paid the plaintiff his said debt. The total amount now due to the plaintiff on account of principal and interest is Rs. 4 ,100.

5. The cause of action for the suit arose on 1-2-68 when the probate was granted and also on the date of the pronote and this court is competent to try the suit.

6. The value of the subject matter of the suit for purposes of jurisdiction and court-fee is Rs. 4,100/-.

The plaintiff claims that an account may be taken of the property, movable and immovable, of the said E. F. deceased and that the same may be administered under the decree of the Court.

(Sd.) A. B.

[*Verification*]

I, A, B, the aforesaid plaintiff, do hereby verify that the contents of paragraphs 1 to 6 of this plaint are true to my personal knowledge and belief.

Verified at Allahabad on the 4th day of October, 1969.

(Sd.) A. B.

(2)

Plaint in suit by Reversioner of deceased Hindu owner of immovable property for declaration of alienation to be void.

In the Court of the Munsif, Jaipur

Original Suit No.....of 1962

A, son of X, caste Thakur, resident of Jaipur, occupation service, aged 25 years ... *Plaintiff*

versus

W, the widow of Ram Krishna, caste Thakur, resident of Jaipur, occupation....., aged 50 years ...*Defendant No. 1*

and

B, son of Y, caste Vaishya, resident of Jaipur, occupation business, aged 40 years ...*Defendant No. 2*

The plaintiff above-named begs to state as under :—

1. That one Ram Krishna was a Hindu governed by the Mitakshara Law of the Banaras School.

2. That the said Ram Krishna was the owner of the property detailed below :—

(i) Two houses in the Chowk Area of Jaipur Nos. 343 and 344.

(ii) Three plots of one acre each, plots Nos. 1, 2 and 3 in village Ramanagar.

3. The said Ram Krishna died in 1952 and, on his death, defendant No. 1 entered into the possession as his widow.

4. The plaintiff is related to the said Ram Krishna as per pedigree given below :—

Mahesh (dead)

Ram Krishna (W—Widow)	Shyam Krishna	Radha Krishna (Dead)
(died issueless)	(died issueless)	A, (plaintiff)

5. All the persons mentioned in the said pedigree who are of a degree higher than the plaintiff, are dead, and the plaintiff is, therefore, the nearest reversionary heir of the said Ram Krishna.

6. That the defendant No. 1 has sold the said property to defendant No. 2 without any legal necessity on 1st March, 1960.

7. That the cause of action arose on 1st March, 1960 within the territorial jurisdiction of this court.

8. That the valuation of the suit for court fee and the jurisdiction is Rs. 1,500.

Relief

The plaintiff claims a declaration that the said sale would be null and void after the death of defendant No. 1 and would not be binding on the plaintiff after the death of defendant No. 1.

(Sd.) A.

(Sd.) *S. B. Jauhari,*

Pleader

20-5-1962

Verification.—I, A, do verify that the facts stated in paragraphs 1 to 8 of the plaint are true to my personal knowledge and belief. I append my signature to this verification at Jaipur on the 20th day of May, 1962.

(Sd.) A,
Plaintiff.

(3)

Plaint in suit to establish right to attached property

In the Court of the Sub-Judge, Delhi

Suit No.....of 1969

A, son of....., aged.....,caste....., resident of..... ... ... *Plaintiff*

versus

1. B, son of....., aged..., caste....., resident of.....
2. C, son of....., aged..., caste....., resident of.....

... ... *Defendants*

The above-named plaintiff begs to state as follows :—

1. The Court of Sub-Judge, Delhi, passed a decree on 1-1-1969 for Rs. 8,000 with costs in favour of the plaintiff and against the defendant No. 1.

2. The plaintiff got attached the house No. 15, Daryaganj, Delhi, belonging to defendant No. 1, in execution of the said decree.

3. In the execution proceedings, the defendant No. 2 filed an objection under Order 21, Rule 58 of Civil Procedure Code that the said property does not belong to defendant No. 1 but is owned by defendant No. 2. The defendant No. 2 alleged that the said property was purchased by him at an auction sale held by the Court of Sub-Judge, Delhi, in execution of a decree passed against the defendant No. 1 by one D, in the execution Case No. 47 of 1968.

4. On 11-5-69, the Court of Sub-Judge, Delhi allowed the objection of defendant No. 2 and dismissed the plaintiff's application for execution.

5. The house in question does not belong to defendant No. 2 but is owned by defendant No. 1 who purchased it in the name of defendant No. 2, only to put a cloak on the real transaction and to defeat the other creditors of defendant No. 1. The property in dispute is liable to attachment and sale in execution of the decree passed against defendant No. 1 and in favour of the plaintiff.

6. The cause of action for the suit arose on 11-5-68 when the Court of Sub-Judge, Delhi allowed the objection of defendant No. 2 and dismissed the plaintiff's execution petition and this Court has jurisdiction to try the suit.

7. The value of the suit for purpose of jurisdiction is Rs. 10,000 (the value of the house in dispute) and court-fee of Rs. 15 for declaration has been paid.

Relief

The plaintiff, therefore, claims that a decree declaring that the house in dispute is owned by defendant No. 1 in reality and defendant No. 2 is a mere *benamidar*, be passed in favour of the plaintiff and against defendant with costs.

(Sd.) A.
Plaintiff.

Verification

I, the above-named plaintiff, verify that the contents of paras 1 to 5 are true to my personal knowledge and belief and those of paras 6 and 7 are believed to be true.

Verified at Delhi on 31-5-69.

(Sd.) A.

(4)

Plaint in suit for removal of constructions interfering with light and air

In the Court of Munsif (West) Allahabad

Suit No.....of 1965.

DP, son of BG, caste Brahman, resident of Mohalla Chowk, Allahabad City ... ... *Plaintiff*

versus

HR, son of GP, caste Kayastha, resident of Mohalla Chowk, Allahabad City ... ... *Defendant.*

The plaintiff begs to state as follows :

1. That the plaintiff is the owner of house No. 76 in Mohalla Chowk, Allahabad which has windows on the west side of it (The boundaries of which are given at the foot of the plaint).

2. That the plaintiff has been enjoying the use of light and air to and for the said house through the said windows, for a period of over 20 years before, and upto the time of obstruction hereinafter complained of, as of right and without interruption.

3. That the defendant on or about March 15, 1964 erected a high wall near the said windows and has thereby completely prevented and obstructed the light and air from entering into the said house by the said windows, thus rendering the plaintiff's house unfit for comfortable dwelling.

4. That the said obstruction of light and air has materially diminished the value of the plaintiff's said house. Formerly, the house was worth Rs. 5,000, but now it is worth not more than Rs. 3,000.

5. That the plaintiff has suffered damage by the said obstruction.

6. That the cause of action arose on 15th March, 1965 when the defendant constructed the wall which has prevented the light and air from entering into the plaintiff's house by the said windows.

7. That the suit is valued at Rs. 2,000 as the loss occasioned to the plaintiff by deterioration in the value of his house caused by the aforesaid obstruction.

8. That the suit is within the cognizance of this Court.

The plaintiff claims—

(a) a mandatory injunction to the defendant to demolish so much portion of his wall as obstructs the said light and air of the plaintiff;

(b) that, in the alternative, on the defendant dealing to do so, the wall may be demolished through the Court at the expense of the plaintiff and the costs of the demolition may be added to the decree in the plaintiff's favour;

(c) that any other relief which the facts of the plaintiff's claim render proper and which the Court thinks fit to grant, may be awarded to the plaintiff.

(Sd.) DP.

Verification

I, DP, the plaintiff, verify that the facts stated in paras 1 to 8 of the plaint are true to my knowledge, information and belief to which I appended my signature within the Civil Court compound on this 20th day of April, 1955.

(Sd.) DP.

Boundary of the house.

(5)

Plaint in suit for damages on account of non-delivery of goods sold

In the Court of the Munsif, Jaipur.

Original Suit No.....of 1961.

A, son of X, caste Bania, resident of Jaipur, occupation business, aged 40 years ... ... — *Plaintiff*

versus

B, son of Y, caste Khattri, resident of Jaipur, occupation business, aged 55 years ... ... *Defendant*

The plaintiff above-named begs to state as under :—

1. That, on the 1st day of January, 1961, the plaintiff and the defendant mutually agreed that the defendant should deliver 20 bags of wheat to the

plaintiff on the 12th day of January, 1961 and that the plaintiff should pay therefor Rs. 8,000 on delivery.

2. That, on the 12th January, 1961, the plaintiff was ready and willing, and offered to pay the defendant the said sum upon delivery of goods.

3. That the defendant has not delivered the goods on the aforesaid date.

4. That the plaintiff was forced to purchase 20 bags of wheat from Messrs. Ram Lal and Sons on 12th January, 1961 for Rs. 1,000.

5. That on account of non-delivery of goods on the aforesaid date by the defendant the .plaintiff suffered a loss of Rs. 200 in the purchase of wheat.

6. That the plaintiff had suffered a great loss in his business on account of the defendant's action of non-delivery.

7. That the *cause of action* arose on the 12th January, 1961 within the jurisdiction of the Court.

8. That the valuation of the suit for purposes of jurisdiction and Court-fee is Rs. 500.

Relief

The plaintiff, therefore, prays :—

(1) That decree for Rs. 500 be awarded to him.

Particulars of damages—

The extra money paid to the other seller of 20 bags of wheat	...	...	Rs. 200
Damages in the business and other mental worries etc.	...	...	Rs. 300
		Total	Rs. 500

That the interest *pendente lite* and future be awarded to him.

(Sd.) A

(Sd.) S. B. Mishra,

Pleader

30-6-61.

Verification

I, A, do verify that the facts stated in paragraphs 1 to 8 of the above plaint are true to my personal knowledge and belief.

I append my signature to this verification at Jaipur on the 30th day of June, 1961.

(Sd.) A

Plaintiff

(6)

Plaint in suit for breach of agreement to marry

In the Court of City Munsif, Kanpur
Suit No. of 1961

B, daughter of M, aged 29 years, resident of Mohalla Colonelganj, Kanpur ... . *Plaintiff*

versus

X, son of N, aged 24 years, resident of Mohalla Mumfordganj, Allahabad ... ... *Defendant*

The above-named plaintiff states as follows :—

(1) On 5th August, 1960, the plaintiff's father with her consent offered her to marry to the defendant who happened to be at Kanpur on that date. The defendant accepted the proposal and it was settled between the parties that the marriage will be performed within two years.

(2) The plaintiff was always ready and willing to marry the defendant but the defendant has refused to marry her and has, on 4th December, 1960, married another Hindu girl.

(3) The plaintiff has suffered special damages, particulars of which are given below :—

Persents made at the time of the settlement of marriage :

(i) One woollen suit costing Rs. 250.

(ii) Cash of Rs. 250 to the defendant.

(iii) One gold ring costing Rs. 250.

(iv) Cash of Rs. 250 consisting of the following :—

1. Rs. 100 to the father of the defendant ;
2. Rs. 100 to his mother ; and
3. Sweets and fruits worth Rs. 50.

(4) The cause of action for the suit arose on 4th December, 1960, the date on which the defendant married another woman and this Court has jurisdiction to try the suit.

(5) The suit for the purposes of jurisdiction and Court-fee is valued at Rs. 2,000 and requsite Court-fee is paid thereon

The plaintiff prays—

(a) a decree for Rs. 1,000 as general damages for mental suffering and public disgrace and humiliation;
(b) Rs. 1,000 as special damages;
(c) interest from the date of the suit to the date of the payment.

(Sd.) B.

I, B, verify that paras 1 to 3 of the plaint are true to my personal knowledge and the rest are true from information received..

Verified at Kanpur on 4th January, 1961.

(Sd.) B.
(Sd.) R. D. Agrawal,
Advocate.

(7)

Plaint in suit on account stated

In the Court of Civil Judge, Kanpur

Suit No. of 1967

1. A, son of...,caste..., resident of.....,Kanpur].

2. B, son of....., caste....., resident of.....,.....,Kanpur.

Partner, of the firm A, B, and Company, 4 Birhana Road, Kanpur ... ... *Plaintiff*

versus

1. C, son of..., resident of...Muzaffar—nagar.

2. D, son of...,caste.....,resident of ..Muzaffar—nagar.

Partners of the firm C. D. & *Company*, New Mandi, Muzaffarnagar ... ... *Defendants*

The plaintiffs above-named beg to submit as under :—

1. The plaintiffs carry on business as grain dealers at Kanpur and the defendants carry on business as sugar merchants at Muzaffarnagar.

2. The plaintiffs used to order from the defendants raw sugar from time to time on credit and the defendants used to order *arher* (pulse) from the plaintiffs from time to time on credit.

3. On 20th April, 1967, C the defendant No. 1, came to the plaintiff's shop and, after going through the accounts on each side, agreed that there was a balance of Rs. 3,000 in favour of the plaintiffs. The said balance was entered on page 40 of the plaintiff's *Khata Bahi* and was duly signed by the said C.

4. The defendants have not paid anything since 20th April, 1967.

5. The cause of action for the suit arose on 20th April, 1967 when the balance was taken and signed by defendant No. 1 and this court has jurisdiction to try the suit.

6. The valuation of the suit for the purposes of jurisdiction and court-fees is Rs. 3,000 and requisite court-fee has been paid thereon.

The plaintiffs claim that a decree for Rs. 3,000 with interest from the date of the suit to that of payment at such rate as the court thinks reasonable, be passed in favour of the plaintiffs and against the defendants.

(Sd.) A
(Sd.) B
} Partners

[*Verification*]

(8)

Plaint in suit for damages for breach of warranty

In the Court of Munsif West, Allahabad

Suit No. of 1967

A, son of...,aged..., caste..., resident of ... *Plaintiff*

versus

B, son of..., aged..., caste..., resident of ... *Defendant.*

The above-named plaintiff begs to state as follows :—

1. On 3rd January, 1967 the defendant sold to the plaintiff 400 maunds of gram by sample which the defendant then showed to the plaintiff.

2. On 15th February, 1967, 400 maunds of gram were delivered to the plaintiff by the defendant in respect of the said sale.

3. On 16th February, 1967, the plaintiff inspected the sai d gram and discovered that it was not equal to sample in the following respects :—

It was worm-eaten and contained a large mixture of other grains and, by reason of this, was worth Rs. 1800...less than if it had been equal to the sample mentioned in paragraph 1 above.

4. On 19th February, 1967, the plaintiff, gave the defendant a notice in writing of the condition of the said gram but the defendant did not reply to it.

5. The cause of action for the suit arose on 15-2-67 when the warranty was breached and this court has jurisdiction to try the suit.

6. The value of the suit for purposes of jurisdiction and court-fees is Rs. 1,800.

The plaintiff claims that a decree for Rs. 1,800 as damages for breach of warranty be passed against the defendant and in favour of the plaintiff and costs be also awarded to the plaintiff.

(Sd.) A,
Plaintiff.

Verification

I, A, the aforesaid plaintiff' do hereby verify that the contents of paragraphs 1 to 6 of this plaint are true to the best of my knowledge and belief.

Verified at Allahabad on day of....., 19.....

(Sd.) A
Plaintiff

(9)

Plaint in suit on account which is not mutual and alternatively, on balance struck

In the Court of Munsif West, Allahabad

Suit No. of 1967.

A, son of...caste..., resident of ... ... *Plaintiff*

versus

B, son of..., caste..., resident of ... ... *Defendant*

The aforesaid plaintiff begs to state as follows :—

1. The plaintiff is a money-lender and carries on a shop for the sale of grain and cloth in Mohalla Badshahimandi in Allahabad.

2. On June lst, 1965, it was verbally agreed between the parties that the plaintiff would advance such sums of money and would supply, on credit, grain and cloth, from time to time, to the defendant as the latter would require and that the defendant would repay the loans and pay the price of the articles purchased, when demanded, with interest at the rate of 2 per cent per mensem.

3. Between June lst, 1965 and April 20th, 1967, the defendant took various loans and made various purchases from the plaintiff and made several payments on account. Particulars of such loans, purchases and payments are given at the foot of the plaint.

4. On 20th April, 1967, an account was made and a balance of Rs. 1,024 was found due from the defendant. The defendant admitted the correctness of the balance which was recorded on page 6 of the plaintiff's *Khata Bahi* and signed by the defendant. The def ndant at the time agreed to repay the said balance with interest at the rate of 1 per cent. per month within two months. This agreement was made by the defendant in writing endorsed under the balance on the same page 6 of the plaintiff's *Khata Bahi*.

5. The defendant has not made any payment since 20th April, 1967.

6. The defendant has not paid the amount or any part thereof, and the plaintiff claims it either as balance due on the original account or, in the alternative, on the basis of the new agreement of 20th April, 1967.

7. The cause of action for the suit arose on 20th April, 1967 when the balance was taken and new agreement was made and the case is within the jurisdiction of this Court.

8. The valuation of the suit for the purpose of jurisdiction and court-fees is Rs. 1,149 and requisite court-fee is paid thereon.

The plaintiff claims—

(a) a decree for Rs. 1,024 on account of principal and Rs. 125 on account of interest from 20th April, 1967 to the date of the suit ; and

(b) interest from the date of the suit to that of payment at such rate as the court deems reasonable.

(Sd.) A.

Plaintiff.

15-7-1967.

Verification

I, A, the aforesaid plaintiff, do hereby verify that the contents of paragraphs 1 to 8 of this plaint are true to my personal knowledge and belief.

Verified at Allahabad on 15th day of July, 1967.

(Sd.) A.
(*Plaintiff*)

Particulars of loans :—

Particulars of purchases :—

Particulars of payments :—

———

(10)

Plaint in suit for damages on account of negligent driving

In the Court of the Civil Judge, Allahabad.
Suit No. of 1965

A, son of X, aged 30 years, Proprietor of Niranjan Cinema, resident of 31, Canning Road, Allahabad.

(Plaintiff)

versus

(1) B, son of Y, aged 40 years, Wine Merchant, Albert Road, Allahabad.

(2) C son of Z, aged 20 years, Proprietor of Coffee House, Allahabad, resident of 20, Edmonston Road, Allahabad.

Defendants.

The plaintiff aforesaid states as follows :

1. That the plaintiff is a big businessman of Allahabad paying Rs. 10,000 as income-tax.

2. That, on 20th January, 1965, while the plaintiff was walking on the left side of Canning Road, near the crossing of Canning Road and Albert Road, he was suddenly knocked down by a car driven by C, defendant No. 2, coming from the Albert Road. The car was being driven at a tremendous speed and took a sharp and sudden turn at the crossing towards Canning Road side with the result that the plaintiff was run over by the car.

3. That as a result of the above accident, the plaintiff has become unconscious and sustained serious injurious inasmuch as he got severe bruises in his right leg and his ribs were fractured.

4. That the plaintiff had to remain in hospital till 15th August, 1965 and had to spend Rs. 6,000 in his treatment.

5. That the accident was due to the rash and negligent driving of the defendant No. 2.

6. That the defendant No. 2 was driver of the defendant No. 1 who was the owner of the car. Defendant No. 2 was acting in the employment of defendant No. 1. As such defendant No. 1 is also liable for damages to the plaintiff.

7. That the cause of action for the suit arose on 20th January, 1965, the date of accident, within the local limits of the jurisdiction of this Court.

8. That the valuation of the suit for purposes of Court-fee and jurisdiction is Rs. 6,000.

Reliefs

The plaintiff claims—

(a) Rs. 6,000 as damages, as detailed below :—

Particulars of special damages :

		Rs.
Expenses on accouut of medicines	...	1,500
Room rent in the hospital	...	1,000
Loss of income	...	3,000
		5,500
General damages	...	500
Total	...	6,000

(b) Costs of the suit,

(Sd.) A

Plaintiff

(Sd.) R. D. Agarwal,
Advocate.

I, A, do hereby verify that the contents of paras 1 to 8 are true to my personal knowledge, and that I affixed my signatures to the plaint and to this verification clause in the Civil Court premises on 20th October, 1965.

(Sd.) A

Plaintiff

(11)

Plaint in suit for short proceeds and expenses of resale

In the Court of Munsif, Shahjahanpur,

Suit No.....of 1962

A, son of.....,aged ....., caste ..... resident of

Plaintiff

versus

B, son of....., aged....., caste....., resident of... ...

Defendant

The above-named plaintiff begs to state as follows :—

1. On 15th December, 1961, the plaintiff put for sale by auction one crate of crockery, subject to the condition that all goods not paid for and removed by the purchaser within ten days after the sale should be resold by auction on his account.

2. The defendant purchased the said crate of crockery for Rs. 2,000 at the said auction sale after noting in writing all the conditions of sale and paid Rs. 100 to the plaintiff at the time of auction.

3. The defendant failed to pay the balance of Rs. 1,900 within ten days after the sale as agreed.

4. The plaintiff served a notice by registered post upon the defendant on 28th December, 1961 calling upon the latter to pay the balance of Rs. 1,900 remaining unpaid, but the defendant did not pay the amount to the plaintiff.

5. The plaintiff re-sold by public auction the said crate of crockery of the defendant on behalf of the defendant on 10th January, 1962 and realised the sum of Rs. 700 only as its price on resale.

6. The plaintiff spent Rs. 50 as the expenses of the said resale.

7. he cause of action for the suit arose on 15th December, 1961 when the balance of Rs. 1,900 was not paid and on 10th January, 1962 when the goods were re-sold and this court has jurisdiction to try the suit.

8. The value of the suit for purposes of jurisdiction and court-fees is Rs. 1,250.

Relief

The plaintiff, therefore, claims that a decree for Rs. 1,250 (Rs. 1,200 being the difference on resale and Rs. 50 being resale expenses, total being Rs. 1,250) be passed in favour of plaintiff and against defendant with costs of the suit.

(Sd.) A
Plaintiff

Verification

I, the aforesaid plaintiff, verify that the contents of paras 1 to 6 of the plaint are true to my personal knowledge and those of paras 7 and 8 are believed to be true.

Verified at Shahjahanpur, this 15th day of February, 1962.

(Sd.) A
Plaintiff

(12)

Plaint in suit for infringement of copyright in a book

In the Court of District Judge, Delhi
Suit No. of 1967

A, son of....., resident of....., Delhi.....*Plaintiff*

versus

B, son of....., resident of....., Delhi .....*Defendant*

The above-named plaintiff begs to state as under :

1. The plaintiff is the author of a book entitled "The Law of Partnership'' and is the owner of the copyright therein.

2. he defendant has infringed the plaintiff's copyright in the said work by copying out *verbatim*, without the plaintiff's consent, the following portions of the plaintiff's book in his book entitled "Partnership in India" which he has published in January, 1967, 2000 in number put on the market for sale.

3. Since the publication of the defendant's said book, the sale of the plaintiff's said book has considerably fallen. The plaintiff estimates this loss at Rs. 1,500.

4. The defendant has, in his possession, a large number of copies of the said book complained of as an infringement. The plaintiff demanded the same from the defendant by a notice sent by post on 14th September, 1967 but the defendant refused to deliver them.

5. The defendant threatens and intends to repeat the infringement of the said copyright of the plaintiff.

6. The cause of action for the suit arose in January, 1967 when the infringement of the plaintiff's copyright was made and this court is competent to try the suit.

7. The valuation of the suit for purpose of court-fee is Rs. 1,500 and proper court-fee has been paid.

Reliefs

The plaintiff claims—

(a) Rs. 1,500 as damages :

(b) an order to the defendant to deliver to plaintiff all the copies of the said book of the defendant that may be in his possession ; and

(c) an injunction to restrain the defendant, his agents and servants, from continuing or repeating any such infringement of the plaintiff's copyright.

(Sd.) A
Plaintiff.

[*Verification*]

(13)

Plaint in suit by Muslim widow for dower

In the Court of Civil Judge, Allahabad.

Suit No. of 1965

Bibi Fatima, w/o Abdul Gani, resident of.....

Allahabad ... ... *Plaintiff*

versus

1. Ramzan Ali
2. Shaukat Ali

sons of Abdul Gani. resident of.....

Allahabad ... ... *Defendants*

The above-named plaintiff begs to state as follows :

1. That the parties to the suit are Sunni Mohammedans.

2. That the plaintiff was married to Abdul Gani, now deceased, on June 20, 1921.

3. That Abdul Gani died on January 24, 1965 leaving two sons, Ramzan Ali, defendant No. 1 and Shaukat Ali, defendant No. 2, who are in possession of the assets left by their deceased father.

4. That the amount of dower was not fixed either before or at the time of marriage or after marriage.

5. That, in view of the circumstances explained in para 4, the plaintiff is entitled to proper dower.

6. That the plaintiff is entitled to a sum of Rs. 50,000 taking into consideration the status of her deceased husband who was an I. C. S. officer.

7. That the plaintiff has made several demands to the defendants but to no effect.

8. That the plaintiff is not in possession of any of her deceased husband's property.

9. That the cause of action arose on January 24, 1965 when Abdul Gani died and March 15, 1965 when the last demand made by the plaintiff was turned down by the defendants and the court has jurisdiction to try this suit.

10. That the valuation of the suit for the purpose of jurisdiction is Rs. 50,000 and a court fee of Rs...on the said sum is being paid.

The plaintiff claims Rs. 50,000 with interest from the date of suit to that of payment from the assets of Abdul Gani, now deceased, in the hands of defendants.

(Sd.) Bibi Fatima

[*Verification*]

I, Bibi Fatima, do hereby verify that the contents of paras 1 to 10 are true to my personal knowledge and information.

Verified at Allahabad on...

(Sd.) Bibi Fatima

(Sd.) .....Advocate.

(14)

Plaint in suit for obstructing a right of way

In the Court of Munsif East, Allahabad

Suit No. of 1969

Krishna, son of Bhagwan Prasad, Thakur by caste, cultivator, resident of Village Soraon, district Allahabad ... *Plaintiff*

Versus

Ram, son of Mohan, by Caste Thakur, profession Shop-Keeping, resident of Mauza Soraon, district Allahabad ... *Defendant.*

Krishna, the above-named plaintiff, states as follows :—

1. The plaintiff is, and, at the time hereinafter mentioned, was, possessed of a house on the plot number 48 in the village Soraon, which is situated to the south of the defendant's land appurtenant to his house on plot number 55 in the very village. A public road runs to the north of the said land of the defendant.

2. The plaintiff was, and is, entitled to a right of way from the said house of the plaintiff over the said land of the defendant, to the said public road and back again from the said road over the said land of the defendant to the house of the plaintiff, for himself and his servants on foot at all the times of the year, from the time of the grandfathers of the parties to the suit.

3. The plaintiff has a right of way by enjoyment thereof for more than 25 years before the obstruction by the defendant, as of right and without disturbance.

4. On the 22nd day of July, 1968, the defendant wrongfully obstructed the said way by constructing a boundary wall across the whole length of the said land adjacent to the house of the plaintiff, so that the plaintiff cannot pass on foot along the way.

5. The valuation of the damage caused to the plaintiff is Rs. 500/-.

6. The cause of action for the present suit arose on 2nd July, 1968, within the jurisdiction of this Court, and this Court is competent to try the suit.

7. The valuation of the suit for the purposes of jurisdiction and payment of Court fee is Rs. 500/-, and requisite Court fee is paid thereon.

Relief

The plaintiff claims that—

(a) a decree for Rs. 500/- as damages be passed in favour of the plaintiff and against the defendant ;

(b) an order be passed directing the defendant to pull down and remove so much of the boundary wall as would permit to the plaintiff the right of way ; and

(c) a perpetual injunction be granted restraining the defendant from repeating or continuing the wrongful act complained of.

Signed : D. P. Agarwal
Counsel for plaintiff.

Signed : Krishna
plaintiff.

Verification

I, Krishna, do hereby verify that the contents of paragraphs 1 to 7 of this plaint are true to the best of my knowledge, information and belief.
Verified at Allahabad on 2nd January, 1969.

Sd./- Krishna
plaintiff.

(15)

Plaint in suit for injunction restraining nuisance and for damages

In the Court of Sub Judge, Delhi
Suit No. of 1968

Jugal Kishore, son of....., aged....., caste....., reisdent of 14, Daryaganj, New Delhi

... *Plaintiff.*

vereus

Abdul Majid, son of....., aged....., caste....., resident of 15, Daryaganj, New Delhi

... *Defendant.*

The above named plaintiff begs to state as follows :—

1. The plaintiff is, and at all the times hereinafter mentioned was, the absolute owner of the house known as No. 14, Daryagaj, New Delhi.

2. The defendant is, and at all times hereinafter mentioned was, the absolute owner of plot No. 15, Daryaganj, New Delhi in the same street adjoining the aforesaid house of the plaintiff.

3. On 10th March, 1968, the defe dant started on his said plot of land a factory for manufacture of fireworks. Large quantities of offensive and unwholesome smoke and other noxious matter are emitted by it and have corrupted the air. The plaintiff's house remains enveloped with smoke with the result that breathing becomes impossible and all household goods and effects become black. The noise coming from the factory makes sleep quite impossible.

4. In consequence, the plaintiff has been compelled to abandon his aforesaid house and to live in great trouble in a rented room.

5. On account of this nuisance, the plaintiff could not fix any tenant for the said house and the defendant is liable for damages.

6. The plaintiff served upon the defendant a notice by registered post to pay the sum of Rs. 1000 as damages due to nuisance but the defendant refused to pay.

7. The defendant threatens and intends, unless restrained from doing so, to continue the said nuisance.

8. The cause of action for the suit arose to the plaintiff on 10th March, 1968 when the defendant started the said nuisance and this court has jurisdiction to try the suit.

9. The valuation of the subject-matter of the suit for purpose of jursidiction and court-fee is Rs. 1,000.

Relief

The plaintiff, therefore, claims—

(a) that the defendant be restrained by injunction from committing or permitting any further nuisance ; and

(b) that a decree for Rs. 1,000 as damages on the basis of the rent of the said house be awarded in favour of the plaintiff and against the defendant.

(Sd.) Jugal Kishore.

Verification

I, the aforesaid plaintiff, solemnly affirm that the contents of paras 1 to 7 of this plaint are to my personal knowledge and belief and those of paras 8 and 9 are based on information received from the counsel and are believed to be true.

Verified at Delhi, this 5th day of May, 1968.

(Sd.) Jugal Kishore.
Plaintiff.

(16)

Plaints in interpleader suits

(A)

In the Court of the Munsif (West), Allahabad
Suit No. of 1965

B, aged 50 years, son of X, money-lender by profession, resident of 39 Canning Road, Allahabad ... *Plaintiff*

versus

(1) A, aged 30 years, son of Y, cloth merchant, resident of 19, Jawahar Square, Allahabad ... *Defendant*

(2) C, aged 29 years, son of Z, Bullion merchant, resident of Chowk, Allahabad, ... *Defendant*

The plaintiff aforesaid states as follows :—

1. That the defendant No. 1 deposited with the plaintiff a box of jewels worth Rs. 2,000 on 10th July, 1964 for safe-keeping.

2. That defendant No. 1 wrote to defendant No. 2 on 10th August, 1964 making the said jewels security for the debt that he owed to C. The plaintiff was informed of this fact by the defendant Nos. 1 and 2 on 11th August, 1964.

3. That, on 10th July, 1965, the defendant No. 1 informed the plaintiff that the debt has been satisfied and claimed back the jewels in question.

4. That, on the same date, the defendant No. 2 informed the plantiff that the debt was not satisfied and the jewels in question should not be returned to defendant No. 1.

5. That the plaint iff is ignorant of the respective rights of the defendants.

6. That the plaintiff has no claim upon the jewels in question other than for charges and costs of the suit, and is ready and willing to deliver them the to such person as the Court shall direct.

7. That the suit is not brought by collusion with either of the defendants.

8. That the cause of action for the suit arose on 10th July, 1965 within the local limits of the jurisdiction of this Court when both the defendants had put forward their respective claims, and this Court is competent to try the suit.

9. That the value of the subject-matter of the suit for purposes of jurisdiction and Court-fee is Rs. 2,000.

Reliefs

That plaintiff claims—

(a) that the defendants be restrained, by injunction, from taking any procedings against the plaintiff in relation to the said box of jewels ;

(b) that they required to interplead together concerning their claims to the said property;

(c) that some person be authorised to receive the said property pending such litigation and

(d) that, upon delivering the same to such person, the plaintiff be dischrged from all liability to either of the defendants in relation thereto and be awarded costs of the suit.

(Sd.) B.

Verification

I, B, the plaintiff, do hereby declare that the contents of paras 1 to 9 are true to my personal knowledge. Verified at Allahabad on 24th July, 1965.

(Sd.) B.

(B)

In the Court of Sub-Judge, Delhi

Suit No. ...of 1967.

A, son of.....,aged....., caste.....,resident of.....*Plaintiff*

versus

1. C, son of....., aged....., caste....., resident of.....
2. D, son of....., aged....., caste....., resident of...*Defendants*

A, the above named plaintiff, begs to state as follows :—

1. On 10th April, 1966, the deceased B (address) deposited with the plaintiff the sum of Rs. 5000 for safe custody. B died on 15th April, 1967.

2. The defendant No. 1 claims the said amount of Rs. 5, 000 as the adopted son and heir of B while the defendant No. 2 claims the said amount under a will executed by B.

3. The plaintiff is ignorant of the respective rights of the defendants. He has no claim on the said mony other than that for charges and costs, and is ready and willing to deliver it to such person as the Court shall direct.

4. The suit is not brought by collusion with either of the defendants.

5. The cause of action for the suit arose on the date when both the defendants had put forward their conflicting claims and this court has jurisdiction to try the suit.

6. The value of the suit for purposes of jurisdiction and court-fee is Rs. 5,000 only.

The plaintiff, therefore, claims—

(a) that the defendants be required to interplead together concerning their claim to the said money;

(b) that the plaintiff be absolved of all liability to either of the defendants in relation thereto and be awarded costs of the suit.

(Sd.) A,
Plaintiff.

Verification

(17)

Plaint in suit (for damages) for malicious prosecution

In the Court of the Munsif, Allahabad.
Suit No... of 1965

B, son of Y, aged 30, cloth merchant, resident of 62, Yahiapur, Allahabad
Plaintiff

versus

C, son of X, aged 40, Advocate, resident of 36, George Town, Allahabad
Defendant

The plaintiff aforesaid begs to state as follows:

1. That the plaintiff is a respectable person paying Rs. 2,000 as income-tax.

2. That, on 7th January, 1965, the defendant filed a complaint against the plaintiff under Section 500 of the Indian enal Code for defamation in the Court of the City Magistrate, Allahabad.

3. That, as a result of the said complaint. the plaintiff was arrested and the bail could not be granted to him till the expirty of one week.

4. That, after the prolonged trial of the said case, the trial ended in the acquittal of the plaintiff on 8th May, 1965.

5. That the said complaint against the plaintiff was altogether false, malicious and without any reasonable or probable cause.

6. That, by reason of the said prosecution, the plaintiff suffered pain of body and mind and was prevented from transacting his business and was injured in his credit and incurred expenses in obtaining his release from the custody and in defending himself against the said complaint.

7. That the plaintiff has suffered damages to the extent of Rs. 1000. The details are given at the foot of the plaint.

8. That the cause of action for the suit arose within the jurisdiction of this Court on 8th May, 1965 when the plaintiff was acquitted, and this Court has jurisdiction to try the suit.

9. That the valuation of the suit for purposes of Court-fee and jurisdiction is Rs. 1,000.

The plaintiff claims—

(a) The sum of Rs. 1,000 towards damages.

(b) Costs of the suit.

Details of damages

(1) Rs. 200 as general damages due to mental and physical pain and loss of reputation.

(2) Special damages :

(a) Rs. 600 due to loss of business.

(b) Rs. 200 as costs of defending against the criminal charge,

(Sd.) B.

I, B, the above—said plaintiff, do hereby verify that the contents of paras 1 to 9 are true to my personal knowledge.

Verified at Allahabad this 12th day of June, 1965.

(Sd.) B.

(Sd.) F.

Counsel.

(18)

Plaint in suit by mortgagee on simple mortgage for recovery of mortgage-money

Or

Plaint in suit for enforcement of simple mortgage

Or

Plaint in suit by mortgagee for sale

In the Court of Munsif (West), Allahabad
Suit No. of 1965

A B, son of C D, caste Thakur, resident of Chowk,
Allahabad ... ... *Plaintiff*

versas

M P, son of S T, caste Brahman, resident of Civil Lines, Allahabad
Defendant

The above-named plaintiff begs to state as follows :—

1. That the plaintiff is the mortgagee of the house belonging to the defendant and the defendant is the mortgagor.

2. That the following are the particulars of the mortgage :

(a) Date—Ist July, 1963.

(b) Names of mortgagor and mortgagee—M P, mortgagor and A B mortgagee.

(c) Sum secured—Rs. 1000

(d) Rate of interest—12 p. c. per annum.

(e) Property subject to mortgage—House No. 10, New Katra, Allahabad.

Boundaries...

(f) Amount now due—Rs. 1,240.

3. That the plaintiff called upon the defendant by service of a registered notice on (date)—to pay the sum due under the mortgage but the defendant has failed to do so.

4. That the cause of action arose on Ist July, 1963, the date of the mortgage, within the jurisdiction of this Court and this Court has jurisdiction to try the suit.

5. That the valuation of the suit for purposes of Court-fees and jurisdiction is Rs. 1,240.

Reliefs

The plaintiff claims—

(a) Payment or Rs. 1,240 with costs of the suit *pendente lite* and future interest by the defendant to the plaintiff, or in default the mortgage property be sold and the decree satisfied out of the sale proceeds.

(b) In case the proceeds of the sale are found insufficient to pay the amount due to the plaintiff, then liberty be reserved to the plaintiff to apply for a decree for the balance under Order 34, Rule 6 of the Code of Civil Procedure.

(Sd.) A B.

Verification

I, A B, the plaintiff, verify, that the facts stated in the plaint are true to my personal knowledge to which I affixed my signature within the Civil Court premises on 11th April, 1865.

(Sd.) A B.
(Sd.) R. D. Agarwal,
Advocate.

(19)

Plaint in suit for redemption upon simple mortgage

In the Court of the Civil Judge, Allahabad.

Suit No. of 1865.

A, son of Y, resident of village Pusa, Tahsil Chail, District Allahabad ... ... *Plaintiff*

versus

X, son of Z, resident in Tahsil Chail, District Allahabad ... ... *Defendant*

A, the above-named plaintiff, states as follows :—

1. That the plaintiff is mortgagor of the property in suit of which the defendant is mortgagee.

2. That the following are the *particulars of the mortgage* :—

(a) Date of mortgage—1st January, 1957.

(b) Name of mortgagor—A.

Name of mortgagee—X.

(c) Sum secured—Rs. 6,000.

(d) Rate of interest—10% per annum.

(e) Property subject to mortgage—No. 50, Village Pusa, Tahsil Chail, District Allahabad.

3. That the plaintiff has paid the interest on the mortgage-money year by year as it accrued due and now only Rs. 6,000, the principal unsecured, is due to the defendant.

4. That the plaintiff deposited the said sum of Rs. 6,000 for the defendant in the Court on 1st January, 1964 along with an application under Section 83 of the Transfer of Property Act.

5. That the defendant was served with a notice of the said deposit but he did not appear to accept the tender on the date fixed by the court which was 1st April, 1964. The money is still in deposit in the Court.

6. That the plaintiff is entitled to redeem the mortgaged property.

7. That the cause of action for the suit arose on 1st January, 1957, the date of the mortgage and on 1st April, 1964 when the defendant failed to appear to accept the deposit, within the jurisdiction of this Court.

8. That the value of the subject-matter of the suit for the purposes of jurisdiction and payment of Court-fee is Rs. 6,000.

Reliefs

The plaintiff claims—

(a) to redeem the said property and to have the same reconveyed to him;

(b) costs of the suit.

(Sd.) A.

Verification

I, A, the plaintiff, do hereby verify that the contents of paras 1 to 8 are true to my personal knowledge and that I affixed my signatures to the plaint and to this verification clause within the Civil Court compound on 1st January, 1965.

(Sd.) A.

(20)

Plaint in suit for cancellation of mortgage deed and for possession over house

In the Court of Munsif West, Allahabad
Suit No.....of 1970.

Hari Chand, son of Pritam Chand, aged....., caste....., resident of ... ...*Plaintiff*

versus

Kedar Nath, son of ....., aged....., caste....., resident of ... ...*Defendant.*

The above named plaintiff begs to state as follows :—

1. The plaintiff and his father, Pritam Chand, constituted a joint Hindu family governed by the Banaras School of Mitakshara Law.

2. Pritam Chand executed a promissory note on 10th July, 1965 for Rs. 1,000 in favour of the defendant, agreeing to pay interest at 12 per cent per annum. On 15th December, 1967, Pritam Chand paid Rs. 100 towards interest and endorsed that payment on the back of the pronote.

3. On 20th March, 1969, Pritam Chand executed in favour of defendant a mortgage with possession of the house No. 414, Katra, Allahabad, owned by the joint family, in consideration of the balance of Rs. 1,353 due under the note, and the mortgage deed was registered on the same day.

4. Pritam Chand died on 7th April, 1970, and the plaintiff is the sole surviving coparcener.

5. The late Shri Pritam Chand was addicted to gambling and had lost Rs. 1,000 to the defendant in the course of gambling. The said pronote was executed in consideration of this sum.

6. The said mortgage deed was executed under undue influence and coercion of the defendant and was entirely without any legal necessity. The debt alleged to be for consideration therefore was contracted in the course of gambling and the defendant is in wrongful possession of the house in question.

7. The plaintiff served upon the defendant a registered notice asking the latter to cancel the mortgage deed and to deliver the possession of the house to the plaintiff but the defendant has not complied with the notice.

8. The cause of action for the suit arose on 20th March, 1969, the date of the mortgage and on (date) when the defendant did not comply with the demands made in the said registered notice.

9. The value of the suit for the purposes of jurisdiction and court-fee is Rs. 1,000, and this court has jurisdiction to try the suit.

The plaintiff, therefore, claims that the said mortgage deed be adjudged void and cancelled and, as a consequential relief, the possession of the said house be given to the plaintiff.

(Sd.) Hari Chand.

Plaintiff.

Verification

I, the aforesaid plaintiff, verify that the contents of paras 1 to 7 of the plaint are true to my personal knowledge and belief and those paras 8 and 9 are believed to be true.

Verified at Allahabad, this 28th day of July, 1970.

(Sd.) Hari Chand.

(21)

Plaint in suit for dissolution of partnership

In the Court of the Munsif, Jaipur
Original Suit No.....of 1969

A, son of B, caste Jayaswal, resident of Jaipur,

Plaintiff

versus

X and Y, sons of Z, caste Khattri, residents of Jaipur,

Defendants

The plaintiff aforesaid begs to state as under :—

1. That he and X and Y, the defendants, have been for 4 years past carrying on business of cloth together under articles of partnership in writing.

2. That several disputes, differences and disagreements have arisen between the plaintiff and defendants as such partners whereby it has become impossible to carry on the business in partnership with advantage to the partners.

3. That X, the defendant No. 1 has misappropriated the sum of Rs. 500 which was the firm's money in December, 1968 which has affected the business.

4. That Y, the defendant No. 2, is the person who deals with the account books of the firm and he does not allow the plaintiff to see the accounts which is a breach of the partnership agreement.

5. That the cause of action arose in December, 1968 when X, the defendant No. 1, misappropriated the firm's money in violation of the firm's agreement.

6. That the defendants reside at Jaipur, within the jurisdiction of the Court.

7. That the valuation of the suit for purposes of jurisdiction and court-fee is Rs. 1,000.

Relief

The plaintiff, therefore, prays—

(1) for the dissolution of the firm and allow him to take his share from the firm ; and

(2) that the cost of the suit be awarded to him.

(Sd.) A.
20-4-1969.

(Sd.) R. D. Agarwal,
Advocate
20-4-69

Verification

I, A, declare that the contents of paras 1 to 7 are true to my personal knowledge and belief.

Verified at Jaipur this 20th day of Ap il, 1969.

(Sd.) A.

(22)

Plaint in suit for demolition of constructions, possession and permanent injunction

In the Court of Munsif, Allahabad

Suit No. ...of 1971
Prem Kumar, son of Suraj Prakash, caste
Zamindar and resident of.....District Allahabad ... ... *Plaintiff*

versus

Rajendar Kumar, son of Madan Lal, caste.....,resident
of....., District Allahabad..... *Defendant*

The above-named plaintiff begs to state as follows :—

1. That the plaintiff is the owner, Zamindar of Mahal ..., village....., Pargana....., Tahsil....., District Allahabad.

2. That the plaintiff is the sole zamindar of the Abadi in the said village.

3. That plot no.....given at the foot of the plaint lies in the aforesaid Abadi.

4. That the said plot had been lying vacant for a very long time and the plaintiff used it occasionally.

5. That the defendant has built a mud house comprising two rooms without any permission or consent of the plaintiff.

6. That the plaintiff came to know of the said construction two days back through his Mukhtar-e-Am and Karinda who, on his inspection tour, saw it and informed the plaintiff.

7. That the defendant has absolutely no title to the said plot of land and his act is wholly unauthorised and illegal.

8. That the defendant has refused to vacate the said plot and to demolish the mud house when asked by the plaintiff's Karinda.

9. That the cause of action arose on 10th February, 1971, when the defendant raised the aforesaid construction and the court has jurisdiction to try this suit.

10. That the valuation of the suit for the purposes of jurisdiction and payment of court-fee is Rs. 240, market value of the land in suit and for the prayer of injunction and valuation is made at Rs. 20 (1/12 of the market value) and a court-fee of the value of Rs..., payable on the said sum of money, is being paid.

Reliefs

The plaintiff prays —

(a) That possession of the plot in suit be given to the plaintiff through a decree of the court with directions to the defendant to pull down and remove the mud house and to restore land to its former condition within a period specified by the court and in case of defendant's making default the same be done through court Amin at the expense of the defendant.

(b) A perpetual injunction by virtue of which defendant be restrained to interfere with plaintiff's user of the plot in suit in future be granted.

(c) Costs of the suit be awarded to the plaintiff.

Boundaries of the plot No.....

East.....

West.....

North.....

South.....

(Sd.) Prem Kumar.

Verification

I, Prem Kumar, declare that the contents of paras 1 to 10 of the plaint are true to my personal knowledge and information.

Verified at Allahabad on 12th February, 1971.

(Sd.) Prem Kumar

(Sd.) R. D. Agarwal,
Advocate.

(23)

Plaint in suit for encroarhment of land

In the Court of Munsif, West, Allahabad.

Suit No. .....of 1970.

A, son of X, aged 39 years, resident of Albert Road, Allahabad.

versus

B, son of Devi, aged 16 years, through his guardian Ramdei, widow of Devi, aged 55 years, resident of Albert Road, Allahabad.

The plaintiff aforesaid submits as follows :—

1. On 15th June, 1965 the plaintiff purchased a piece of land at Allahabad shown by letters O P U V in the sketch map at the foot of the plaint for a consideration of Rs. 500 by a registered deed.

2. The plaintiff constructed a house at a cost of Rs. 10,000 in the portion O P Q R and left the portion R Q U V as his *sehan*.

3. The defendant is the owner of the adjoining house towards south shown by letters in the aforesaid sketch map which U V S T is occupied by him and his mother.

4. On or about Ist July, 1970, the defendant constructed a kotha and, in so doing, he encroached upon plaintiff's land. The encroached portion is shown in the sketch map by letters W XV IV.

5. The defendant refuses to vacate and threatens to continue in his act of dispossession.

6. The cause of action for the suit arose on or about Ist July, 1970 within the jurisdiction of this court where the property in question is situate.

7. The suit is valued at R .....for purposes of jurisdiction and at Rs.....for payment of court fee.

The plaintiff claims—

(1) Posscssion of the land shown by letters W X V V I in the sketch map given below the plaint ;

(2) Demolition of the construction raised in the portion W X VI V.

(3) Permanent injunction restraining the defendant from interfering with Plaintiff' sposession over the portion W X VV[1],

Signed 'A'

1-12-70.

Verification

I, A, declare that the contents of paras 1, 2, 3, 4, 5 and 6 are true within my personal knowledge.

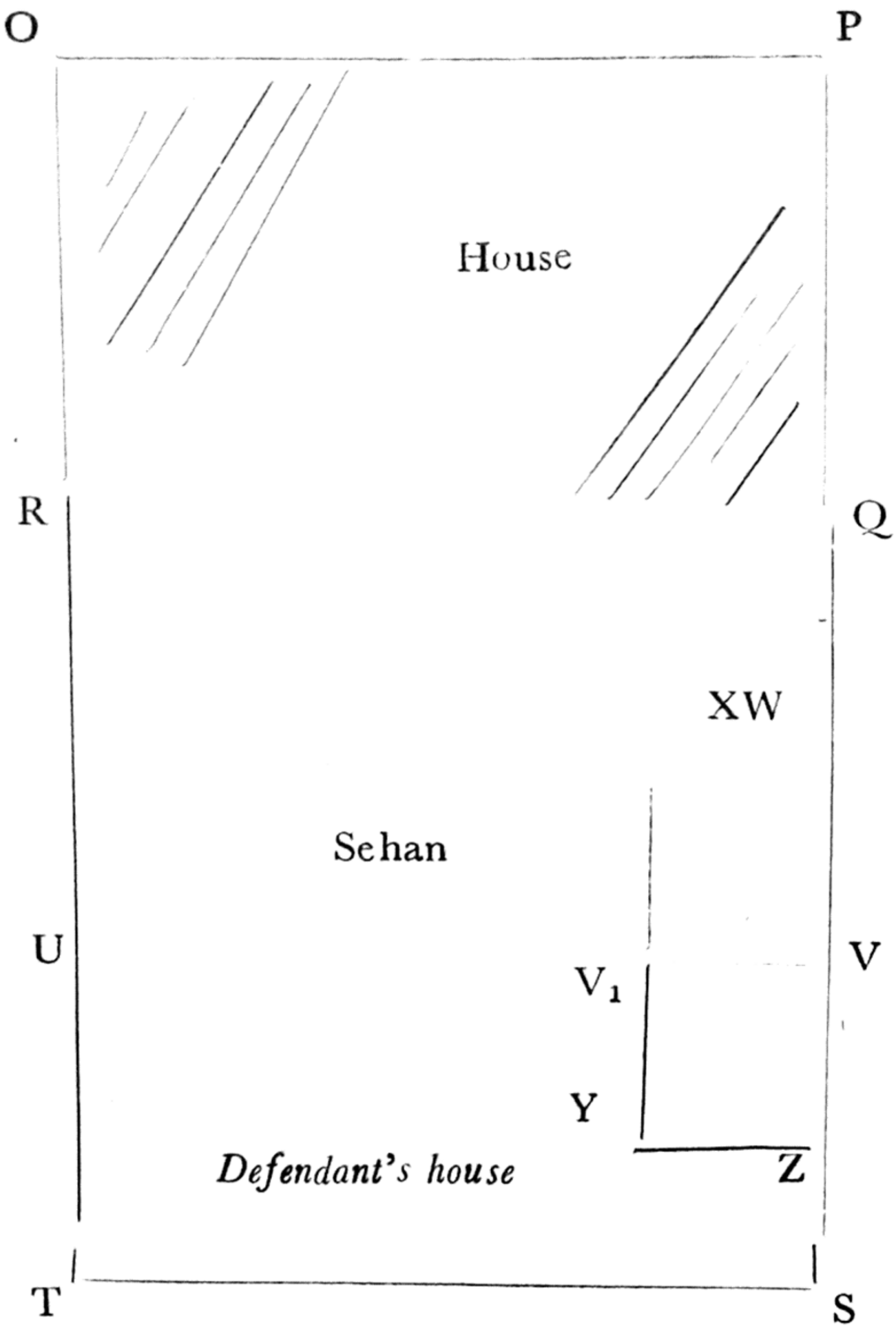
Verified this day, *i. e.*, on.....at Allahabad

Signed 'A'

R. D. Agarwal

(Counsel)

Sketch Map



(24)

Plaint in suit for recovery of possession of land with mesne profits

In the Court of Civil Judge, Allahabad

Suit No. of 1965

A B, son of XY, caste Thakur, resident of 33, George Town, Allahabad ... ... *Plaintiff*

versus

CD, son of OP, caste Brahman, resident of 15, Katra, Allahabad ... ... *Defendant*

The plaintiff begs to state as follows :—

1. That the plaintiff was, on November 15, 1964, and still is the owner and proprietor of the land detailed at the foot of this plaint, in the village LP situate in Tahsil Manjhanpur in the district of Allahabad, and has been in possession of it upto the said date.

2. That, on the said date, the defendant wrongfully entered into possession and has since then been retaining possession of the said land, without the plaintiff's consent.

3. That the estimated value of the said land is Rs. 8,000 and it could be let out at Rs. 600 per year.

4. That the cause of action for the suit arose on 1 th November, 1964 within the jurisdiction of this Court when the defendant wrongfully entered into possession of the said land, and this Court has jurisdiction to try the suit.

5. That the valuation of the suit for purposes of Court-fee and jurisdiction is Rs. 8,250.

The plaintiff claims—

(a) to recover possession of the said land ;

(b) Rs. 250 as mesne profits, with future mesne profits at Rs. 600 per year from the date of the suit to that of possession.

(Sd.) AB.

Verification

I, AB, verify that the contents of paras 1 to 5 of the plaint are true to my best knowledge and information and that I affixed my signatures to the plaint and to this verification clause within the Civil Court premises on 19th April, 1965.

(Sd.) AB.

Details of Land

(25)

Plaint in suit for ejectment of tenant

In the Court of Sub-Judge, Delhi

Suit No. of 1963

A B, son of Ram, aged 40 years, caste Kayastha, resident of 49, Connaught Place, New Delhi ... ... *Plaintiff*

versus

C D, son of Gopal, aged 35 years, caste Punjabi, resident of 146, Lowther Road, New Delhi ... ... *Defendant*

The above-named plaintiff begs to state as follows :—

1. By a deed of lease, dated 1st September, 1961, executed by the defendant in favour of the plaintiff the defendant agreed to take the bungalow of the plaintiff described below for the purpose of residence on a monthly rent of Rs. 300. The tenancy is monthly and commences from the first day of each English calendar month. The defendant entered into possession on 1st September, 1961.

Bunglow No. 146, Lowther Road, New Delhi, *bounded* on North by public road, on East by house of Ghanshyam, on South by public road and on West by street.

2. The said bungalow is required by the plaintiff for his own use and occupation as he is living in a very small house at present.

3. The plaintiff duly determined the said tenancy by serving on the defendant, by registered post, on 13th December, 1962, a notice to quit the said bungalow by the end of December, 1962 ; yet the defendant has not vacated the bungalow by that date.

4. The defendant is liable to ejectment.

5. The cause of action as to relief of ejectment arose on 1st January, 1963 when the defendant did not deliver possession of the bungalow to the plaintiff, and this court has jurisdiction to try the suit.

6. The value of the suit for purposes of jurisdiction and court fee is Rs. 3,600, being the rent for twelve months.

Relief

The plaintiff claims that a decree for ejectment of the defendant from the said property be passed against the defendant and possession of the same be given to the plaintiff.

(Sd.) A. B.
Plaintiff.

Verification.—I, A, B, the aforesaid plaintiff, verify that the contents of paras 1 to 3 are true to my personal knowledge and belief and those of paras 4 to 6 are believed to be true.

Verified at Delhi this 15th day of January, 1963.

(Sd.) A. B.,
Plaintiff.

N. B.—Under the present local law, a tenant can be ejected only on certain grounds, e. g., non-payment of rent, use of property for a purpose other than that for which it was let, reasonable and *bonafide* requirement of the property by the landlord for his personal use, etc. So, a tenant cannot be ejected merely on the ground that the tenancy has been determined by a valid notice to quit or otherwise. In this connection, local Rent Control Acts may be studied.

(26)

Plaint in suit for ejectment on ground of non-payment of rent

In the Court of Munsif West, Allahabad.

Suit No.....of 1969

AB, son of Ram, aged 40 years, caste Kayastha, resident of 49, New Katra, Allahabad ... ... *Plaintiff*

versus

CD, son of Gopal, aged 25 years, caste Vaish Agarwal, resident of 146, Lowther Road, Allahabad ... ... *Defendant*

AB, the above-named plaintiff, begs to state as follows :—

1. By a deed of lease, dated 1st September, 1967, executed by the defendant in favour of the plaintiff, the defendant agreed to take the house of the plaintiff described at the foot of the plaint for the purpose of residence on a monthly rent of Rs. 300/- besides house-tax and all electric and water charges.

2. The tenancy is monthly and commences from the first day of each English calendar month. The defendant entered into possession of the house on 1st September, 1967.

3. The plaintiff duly determined the said tenancy by serving on the defendant, by registered post, on 13th December, 1968, a notice to quit the said house by the end of December, 1968, but the defendant has not vacated the house by that date.

The notice also required the defendant to pay Rs, 900/- as the arrears of rent for the three months of October, November and December, 1968, along with Rs. 36/- as house tax and Rs. 54/- as water and electric charges, but the defendant failed to pay the demand.

4. The defendant is liable to ejectment for non-payment of rent.

He is liable to pay the plaintiff the sum of Rs. 990/- as arrears of rent and house-tax and water and electric charges.

5. The cause of action as to relief for ejectment arose on 1st January, 1969, when the defendant did not deliver possession of the house to the plaintiff, and, as to the rent, on 1st October, 1968 when the rent became due in advance, and this court has juridiction to try the suit.

6. The value of the suit for the purpose of court-fee as to the relief of ejectment is Rs. 3,600/- (being 12 months' rent) and, as to the relief of recovery of arrears of rent, is Rs. 990/-, and separate court-fees have been paid thereon, and the value of the suit for the purpose of jurisdiction is Rs. 4,590/-.

Relief

The plaintiff claims that—

(a) a decree for ejectment of the defendant from the said property be passed against the defendant, and possession of the same be given to the plaintiff ; and

(b) a decree for the sum of Rs. 990/- be also passed in favour of the plaintiff and against the defendant.

(Sd.) A. B.
Plaintiff

Verification

I, AB, the aforesaid plaintiff, verify that the contents of paras 1 to 3 of this plaint are true to my personal knowledge and belief and those of paras 4 to 6 are believed to be true.

Verified at Allahabad, this 15th day of January, 1969.

(Sd.) A. B.
Plaintiff

(Sd.) R. Dayal
Advocate.

Details of House

House No. 146, Lowther Road, Allahabad, bounded as follows :—

North—Public Road.
East—House of Shyam.
South—Public road.
West—Street.

(27)

Plaint in suit for pre-emption of house

In the Court of Munsif, Jaipur

Original Suit No.....of 1963

A, son of B, caste Sunni Muslim, resident of Jaipur ... *Plaintiff*

versus

X, son of , caste Shia Muslim, resident of Jaipur ... *Defendant*

The plaintiff aforesaid begs to state as under :—

(1) That R sold the house described below to the defendant by a sale-deed, dated 24th February, 1963 for an ostensible consideration of Rs. 3,500.

(2) That the real consideration was only Rs. 2,500.

(3) That the plaintiff and R are both Sunni Mohammedans.

(4) That the plaintiff owns a house to the west of and adjoining the said house, and is a *shafi-i-zar* and the defendant has no right equal or superior to that of the plaintiff.

(5) That the defendant's house is to the west of the plaintiff's house, *i.e.* in between the defendant's house and the disputed house lies the plaintiffs' house.

(6) That the plaintiff heard of the sale for the first time on 24th March, 1963 and immediately declared his intention to assert the right of pre-emption.

(7) That on the same date, *i. e.*, on 24th March, 1963, the plaintiff made a formal *talab-i-ishtishad* in the presence of witnesses, and in the presence of the defendant and the said R.

(8) The cause of action arose on 24th February, 1963, at Jaipur within the jurisdiction of the Court.

(9) The valuation of the suit is Rs. 2,500 for the Court-fee purpose.

Relief

The plaintiff, therefore, prays that the possession of the said house must be given to him on payment of Rs. 2,500 and the sale-deed must be executed in his favour.

(Sd.) A.
28-3-1963.

(Sd.) K. L. Gaur,
Pleader.
28-3-1963.

Verification

I, A, declare that the contents of the above paragraphs are true to my personal knowledge and belief.

Verified at Jaipur this 28th day of March, 1963.

(Sd.) A.
28-3-1963

(28)

Plaint in case of non-delivery of goods sold for cash

In the Court of Small Causes, Delhi
Suit No.....of 1967.

Sant Lal, son of.....,aged....., caste....., resident of 15, Daryaganj, Delhi ... ... *Plaintiff*

versus

1. ratap Chand, proprietor of M/s.Pratap & Sons, Kashmere Gate, Delhi.

2. Chuni Lal, son of....., aged.....,caste....., resident of.....Delhi ... ... *Defendants*

The above-named plaintiff begs to state as under :—

1. The plaintiff bought a cabinet from the defendant No. 1 for Rs. 300 and paid the price to the defendant No. 1 at the time of sale and informed the defendant No. 1 that the plaintiff would take the cabinet after a fortnight.

2. The plaintiff approached the defendant No. 1 for receiving the delivery of the said cabinet who refused to do so and told the plaintiff that the said cabinet has been sold to defendant No. 2 as the plaintiff did not turn up earlier to take the delivery.

3. The plaintiff has paid the price of the said cabinet and the defendant No. 1 was merely a bailor of the goods and was not entitled to sell to defendant No. 2.

4. The defendant No. 1 is the vendor of the said cabinet to the defendant No. 2 who has been impleaded as the buyer of said cabinet and who is liable to return the same to the plaintiff.

5. The cause of action for the suit arose on (date) when the plaintiff asked for the delivery of the said cabinet and the defendant No. 1 refused to deliver, and this court is competent to try the suit.

6. The value of the subject-matter of the suit for purpose of jurisdiction and court-fee is Rs. 300 and requisite court-fee has been paid thereon.

Reliefs

The plaintiff, therefore, claims that—

(a) a decree against defendant No. 2 be passed directing defendant No. 2 to return the said cabinet to the plaintiff; or

(b) in the alternative, a decree for Rs. 300 with costs of the suit be passed in favour of the plaintiff against the defendant No. 1 and interest be also awarded to the plaintiff.

(Sd.) Sant Lal
Plaintiff.

Verification

I, the aforesaid plaintiff, verify that the contents of paras 1 to 4 are true to my personal knowledge and belief and those of paras 5 and 6 are believed to be true on information received.

Verified at Delhi, this 15th day of February, 1967.

(Sd.) Sant Lal.

(29)

Plaint in a suit on pronote

In the Court of Small Causes, Allahabad

Suit No.....of 1965

A B, son of W X, caste Kayastha, resident of Katra,
Allahabad ... ... *Plaintiff*

versus

C D, son of Y Z, caste Thakur, resident of George Town,
Allahabad ... ...*Defendant*

The plaintiff above-named states as follows :—

1. That on 1st July, 1963 the defendant borrowed Rs. 100 from the plaintiff by executing a promissory note attached to this plaint and agreeing to repay the amount with interest at 5 per cent. per annum on demand.

2. That inspite of repeated demands the defendant has not repaid the same amount or interest or any part thereof.

3. That the amount of Rs. 100 on account of principal and Rs. 10 on account of interest for two years at the contractual rate, *i. e.*, total Rs.110 is now due to the plaintiff from the defendant.

4. That the cause of action for this suit arose on 1st July, 1963, the date of execution of the note, at Allahabad within the jurisdiction of this Court.

5. That the valuation of the subject-matter of this suit for the purposes of jurisdiction and Court-fee is Rs. 110 and the requisite Court-fee has been paid thereon.

Relief

The plaintiff claims a decree for Rs. 110 against the defendant with interest at 5 per cent. per annum from the date of suit till realisation and the costs of the suit.

(Sd.) A. B.

Verification

I, A, B, the plaintiff, do verify that the contents of paras 1 to 5 of the plaint are true to my personal knowledge. Verified at Allahabad on 1st July, 196 .

(Sd.) GH.
Counsel.

(Sd.) AB.

(30)

Plaint in suit for recovery of amount due to endorsee of pronote from drawer and payee of pronote after notice of its dishonour for payment

In the Court of Munsif West, Allahabad.

Suit No.—of 1968

A, son of....., aged....., caste....., resident of.....*Plaintiff*

versus

1. B, son of.....,aged....., caste....., resident of...
2. C, son of....., aged....., caste....., resident of... } *Defendants*

The above-named plaintiff begs to state as follows :—

1. The plaintiff is the holder of a pronote for Rs. 1,000 dated 7-7-1 68 drawn by defendant No. 1 upon D, payable to defendant No. 2 or order.

2. The defendant No. 2 endorsed the said pronote to the plaintiff, on 20-7-1968.

3. On 30-7-68, the said pronote was duly presented by the plaintiff to said D for payment and was dishonoured.

4. On 2-8-68 the plaintiff, by a registered letter, gave notice of the said dishonour for payment to the defendants but neither of the defendants has paid the amount of the pronote to the plaintiff.

5. The cause of action for the suit arose on 20-7-68 when the said pronote was endorsed in favour of the plaintiff and this court has jurisdiction to try the suit.

6. The value of the suit for purposes of jurisdiction and court-fees is Rs. 1,200.

Relief

The plaintiff claims the sum of Rs. 1,000, the amount of the pronote, and Rs. 200 as interest from (date) to (date) total Rs. 1,200.

(Sd.) A
Plaintiff.

Verification

(31)

Plaint in suit for recovery of price of goods sent for repairs but unreturned after repairs

In the Conrt of Small Causes, Delhi.
Suit No.—of 1965

Amarnath, son of....., aged....., caste....., resident of... *Plaintiff*

versus

Basant Lal, son of... ....., aged... ....., caste.....,resident of...*Defendant*

The plaintiff above-named begs to submit as follows :

1, The plaintiff is a Jeweller and carries on his business at Delhi and the defendant is a goldsmith carrying on his business at Calcutta.

2. The plaintiff used to send articles of Jewellery to the defendant for repairs by post.

3. On 10th April, 1962, the plaintiff sent a packet of jewellery worth Rs. 500 for repairs to the defendant.

4. The defendant was guilty of negligence and failed to return this jewellery after duly repairing the same.

5. The plaintiff served a notice on 15th December, 1962 upon the defendant charging him with negligence and demanding Rs. 500 as the price of the jewellery.

6. The defendant has neither returned the jewellery nor paid the price of the same as demanded in the notice.

7. The plaintiff is entitled to recover the sum of Rs. 500 from the defendant.

8. The cause of action for the suit arose on 10th April, 1962 when the jewellery was sent to the defendant for repairs and on 15th December, 1962 when the notice was served upon the defendant who refused to pay the price or to return the jewellery, and this court has jurisdiction to try the suit as the jewellery despatched from Delhi was to be delivered at Delhi.

9. The value of the subject-matter of the suit for purposes of jurisdiction and court-fee is Rs. 500 and the requisite court fee is paid thereon.

The plaintiff, therefore, prays that a decree for Rs. 500 be passed in favour of the plaintiff and against the defendant with costs and any other relief to which the plaintiff be found entitled be awarded to the plaintiff.

(Sd.) Amarnath

Verification

I, Amarnath, the above-named plaintiff, solemnly affirm that the contents of paras 1 to 7 are true to my personal knowledge and those of paras 8 and 9 are believed to be true on information received.

Verified at Delhi, this 15th day of February, 1965.

(Sd.) Amarnath

(32)

Plaint in suit by Judgment-debtor for recognition of his payment to Decree-holder

In the Court of the Munsif (West) Allahabad

Suit No.—of 1965

A B, son of C D, caste Thakur, resident of Mohalla Unchamandi, Allahabad City ... ... *Plaintiff*

versus

W, X, son of Y Z, caste Brahman, resident of Mohalla Badshahi Mandi, Allahabad City ... ... *Defendant*

The plaintiff begs to state as follows :—

(1) That, on July 20, 1964, the plaintiff paid Rs. 800 to the defendant at his house in full payment of the latter's decree No. 520 of 1963 passed by this Court, and the defendant agreed to credit the money towards the said decree.

(2) That, on January 6, 1965, the defendant applied for execution of the said decree in full, and did not give credit for the sum of Rs. 800 paid to him as aforesaid.

(3) That the Court executing the defendant's decree did not recognise the said payment of Rs. 800/- by the plaintiff to the defenant as the payment aforesaid was not certified to it.

(4) That now a sum of Rs. 872 (Rs. 800 being the principal money and Rs. 72 on account of interest from the date of payment to the date of suit at 12 per cent per annum by way of damages) is due to the plaintiff against the defendant.

(5) That the cause of action arose on January 6, 1965 when the defendant applied for the execution of his decree against the plaintiff.

(6) That the suit is valued at Rs. 872 for the purposes of court-fees and jurisdiction and is within the cognizance of this Court.

The plaintiff, therefore, prays that a decree for Rs. 872 with further interest from the date of suit to that of payment be passed in favour of the plaintiff against the defendant.

(Sd.) A. B.

I, AB, the plaintiff, verify that the facts stated in paras 1 to 6 of the plaint are true to my knowledge and information and belief, to which I set my hands within the Civil Court compound on this 20th day of April, 1965.

(Sd.) AB.

(33)

Plaint in suit for setting aside a relinquishment deed executed by a pardanashin woman

In the Court of Munsif, Allahabad
Suit No. of 1969

Ram Raji, widow of A, aged 60 years, resident of 345, Mumfordganj Allahabad ... ... *Plaintiff*

versus

Gopal, son of B, aged 45 years, resident of 77, New Katra, Allahabad

Mst. Ram Raji, the aforesaid plaintiff, begs to state as follows :—

(1) The plaintiff is a *pardanashin* and illterate Hindu widow and the defendant is her brother's son who has been managing her property ever since the death of her husband four years ago and the plaintiff always reposed implicit confidence in him and had no other independent advice.

(2) On August 26, 1968, the defendant verbally represented to the plaintiff that it would facilitate the conduct of a case instituted on her behalf in respect of her property if she executed a Mukhtarnama in favour of the defendant. The plaintiff assented to the proposal.

(3) On September 1, 1968, the defendant brought to the plaintiff a document and represented that it was a Mukhtarnama, and induced the plaintiff by such representation to affix her thumb mark to it.

(4) Next day, i. e., on September 2, 1968, the defendant brought the Sub-Registrar to the plaintiff's house. The said Sub-Registrar did not read out or explain the contents of the deed to the plaintiff, but simply asked her whether she had put her thumb mark on it. The plaintiff admitted having done so, and the Sub-Registrar thereupon got her thumb mark affixed at another place on the said deed.

(5) The representation of the defendant that the deed was a Mukhtar-nama was false. The plaintiff on January 4, 1969, learnt that the deed was a deed of relinquishment in favour of the defendant in respect of a bungalow No. 70 of the plaintiff situate at Canning Road, Allahabad on receipt of Rs. 10,000 from the defendant.

(6) The defendant well knew that the said representation was false. He made the same fraudulently, with a view to induce the the plaintiff to affix her thumb mark on the deed and to admit the execution of the deed before the said Sub-Registrar.

(7) The aforesaid relinquishment deed is void having been got executed by fraudulent misrepresentation made by the defendant and, if left outstanding it is certain to be used by the defendant against the plaintiff. The plaintiff has learnt that the defendant has applied to the Municipal Board, Allahabad for mutation of his name in respect of the said property and she apprehends that she will be deprived of the said property.

(8) The plaintiff required the defendant by a registered notice dated 8th January, 1969, to acknowledge the said deed to be null and void and to hand it over to the plaintiff but the defendant has not complied with the notice.

(9) The cause of action for the suit arose on Ist September, 1968 when the relinquishment deed was fraudulently got executed, and this court is competent to try the suit.

(10) The value of the suit for purposes of jurisdiction and court-fees is fixed at Rs. 800.

The plaintiff, therefore, claims to have the said deed of relinquishment adjudged void and cancelled.

(Sd.) Thumb-Impression
of Plaintiff.

Verification

(34)

Plaint in suit for specific performance of contract

In the Court of Civil Judge, Allahabad

Suit No.....of 1965.

X, son of M, Bania, aged about 45 years, residing at 25, Canning Road, Allahabad ... ... *Plaintiff*

versus

1. B, son of A, Bania aged about 30 years, residing at Mohalla Kydganj, Allahabad.

2. Y, son of N, Bania, money-lender, aged about 42 years, residing at Mohalla Muthiganj, Allahabad..... *Defendants.*

The above-named plaintiff begs to state as follows :—

1. On 15th April 1965, A, the father of defendant No. 1, entered into a contract with the plaintiff for sale of his house described at the foot of the plaint for Rs. 10,000 within two months and in pursuance of the contract executed the agreement filed herewith.

2. The plaintiff was ready and willing to perform his part of the contract within the aforesaid time, and, on 28th April, 1965 and on subsequent dates, he tendered the consideration to A but A did not execute any deed of transfer whereby the plaintiff has lost the benefit of the purchase and has suffered damage.

3. The said A, in disregard of the said agreement, executed by him in the plaintiff's favour, executed on 1st May, 1965 a sale deed of the same house in favour of defendant No. 2 for Rs. 12,000. Being apprised of the fact, the plaintiff went to the Sub-Registrar's office before the said sale-deed was presented for registration and, immediately after the presentation of the sale deed to the Sub-Registrar by defendants, the plaintiff filed the application to the Sub-Registrar intimating the fact that the plaintiff had the prior contract in his favour and requesting the Sub-Registrar to notify that fact to the defendants. The Sub-Registrar thereupon duly notified the fact of the existence of the prior contract in favour of the plaintiff and then registered the sale-deed.

4. The defendant No. 2 purchased the said house with notice of the prior contract in favour of the plaintiff.

5. As against the rights of the plaintiff under the contract, the said sale deed executed by defendant No. 1 in favour of defendant No. 2 is not valid and the plaintiff is in law entitled to specific performance of the contract as against the defendants.

6. The said A has since died and defendant No. 1 as his heir has acceded to his property.

7. The cause of action for the suit arose on 15th April, 1965 when A executed the agreement in favour of the plaintiff on 1st May, 1965 when the defendant No. 1 in violation of the plaintiff's rights under the said agreement executed a sale-deed in respect of the same property in favour of defendant No. 2 and on 10th June, 1965 when the plaintiff notified before the Sub-Registrar the fact of the existence of the prior contract in favour of the plaintiff to the parties to the sale-deed (*i. e.*, the father of defendant No. 1 and the defendant No. 2), at Allahabad where the property is situated within the jurisdiction of the court.

8. The valuation of the suit for the purpose of jurisdiction and court-fees is Rs. 10,000 and *ad valorem* court-fees is paid thereon.

Reliefs

The plaintiff claims that this court may be pleased to pass a decree—

(a) directing defendant No. 2 to execute a sale-deed in respect of the house in suit in favour of the plaintiff receiving Rs. 10,000 consideration for the same ;

(b) directing defendant No. 2 to deliver possession of the house to the plaintiff ;

(c) *in the alternative*, allowing Rs. 10,000 as damages for non-performance of the contract ;

(d) directing the defendants to pay the costs of the suit ; and

(e) granting such further or other relief which this court may deem fit and proper.

Description of property

House property, No. 48, Mohalla Muthiganj-its boundaries are as follows :

North :—'A' (name of) Road ;

West :—Musjid ;

East :—Mewa Lal Sonar's house ;

South :—'B' Road.

Verification

I, X, the plaintiff, declare that the facts stated in paras 1 to 8 of the plaint are true to my personal knowledge.

Verified at Allahabad on 18th October, 1965.

(Sd.) X

Plaintiff.

N. B. In the case of claim for specific performance of the contract only and not also for damages, the following amendments be made in the above plaint :—

(1) In para 2 of that plaint, the last words "and has suffered damage" need not be given in the other plaint.

(2) Under Relief in the plaint, clause (c) need not be given in the other plaint.

(35)

Plaint in suit for wrongful dismisal

In the Court of Civil Judge, Allahabad

Suit No. of 1965

A, son of D, caste Agarwal, resident of 9, Zero Road, Allahabad ... ... *Plaintiff*

versus

B, son of R, caste Kayastha, resident of 16, Canning Road, Allahabad ... ... *Defendant*

The plaintiff begs to state as follows :

1. That, on 1st January, 1964, the plaintiff and the defendant mutually agreed that the plaintiff s ould serve as an accountant in the defendant's factory and that the defendant should employ the plaintiff as such for a period of five years and pay Rs. 300 a month for his services.

2. That, on 1st January, 1964, the plaintiff entered upon the service of the defendant and has ever since been, and still is, ready and willing to continue in such service during the remainder of the said five years whereof the defendant always has had notice.

3. That the defendant wrongfully discharged the plaintiff on 1st March, 1965, and refused to permit him to serve as aforesaid.

4. That the plaintiff has suffered Rs. 13,800 on account of damages due to his wrongful dismissal before the stipulated time.

Particulars of damages

Pay for 4 months, the unexpired portion of service.....Rs. 13,800.

5. That the cause of action for the suit arose within the jurisdiction of this Court at Allahabad on 1st March, 1965, when the defendant wrongfully discharged the plaintiff from his services.

6. That the valuation of the suit for the purposes of Court-fees and jurisdiction is Rs. 13,800 and this Court is competent to try the same.

Relief

The plaintiff claims Rs. 13,800 on account of damages.

(Sd.) *A*

I, A, the plaintiff, verify that the facts stated in paras 1 to 6 of the plaint are true to my personal knowledge to which I affixed my signatures to this verification clause within the Civil Court compound on 26th April, 1965.

(Sd.) A.
(Sd.) R. D. Agarwal
Advocate

———

CHAPTER XV

Drafted Written Statement

(1)

Written Statement in suit to establish right to attached property

In the Court of Sub-Judge, Delhi

Suit No. 100 of 1969

A ... ... *Plaintiff*

versus

B and another ... ... *Defendants*

Written statement on behalf of defendant No. 2.

C, the answering defendant, states as follows :—

1. Para 1 of the plaint is not admitted for want of knowledge.

2. In para 2 of the plaint, it is admitted that the house in dispute was attached.

3. and 4. Paras 3 and 4 of the plaint are admitted.

5. Para 5 of the plaint is emphatically denied. The house in dispute belongs to defendant No. 2 and not to defendant No. 1 as alleged in the plaint. The said property was purchased for valuable consideration by defendant No. 2 and the purchase-money was paid to one D by a bank-draft.

6. Para 6 of the plaint is denied. The plaintiff has no cause of action against the answering defendant (i.e., defendant No. 2).

7. Para 7 of the plaint is legal and requires no reply.

Additional Pleas

8. The suit is barred by limitation.

9. The suit is not maintainable as defendant No. 2 is an auction-purchaser certified by the Court.

It is, therefore, prayed that the suit be dismissed with costs and special costs under Section 35-A of C. P. C. also be awarded to the answering defendant.

(Sd.) C.
Defendant No. 2

Verification

I, C, the aforesaid defendant, do hereby verify that the contents of paragraphs 1 to 9 of this written statement are true to my personal knowledge and belief.

(Sd.) C.
Defendant.

(2)

Written Statement in suit by Muslim widow for dower

In the Court of Civil Judge, Allahabad

Suit No...of 1965

Bibi Fatima, w/o Abdul Gani, resident of.....Allahabad ... *Plaintiff*

versus

1. Ramzan Ali | sons of Abdul Gani,
2. Shaukat Ali | resident of.....

Allahabad ... ... — ... ... *Defendants*

Written statement of Ramzan Ali, defendant No. 1 begs to state as follows :—

1. Paras 1 and 2 of the plaint are admitted.

2. The defendant denies so much of para 3 of the plaint which says that the defendant No. 1 is also in possession of the assets of Abdul Gani, deceased ; rest of it is admitted.

3. The defendant was living separately before the death of his father, Abdul Gani, and does not know anything about the assets of his father.

4. The suit is liable to be dismissed as against him and costs be awarded to him.

Verification

I, Ramzan Ali, verify, that the contents of paras 1 to 4 are true to my personal knowledge and information.

(Sd.) Ramzan Ali,
Defendant No. 1
(Sd.) .....Advocate

(3)

Written Statement in suit for encroachment of land

In the Court of Munsif West, Allahabad

Suit No. 999 of 1970

A ... ... *Plaintiff*

versus

B ... ... *Defendant*

Written statement on behalf of the defendant aforesaid.

1. The defendant admits that the plaintiff purchased land under his house by a registered deed dated 15th June, 1965 for a consideration f Rs. 500 but it is denied that the portion RQUV was purchased by him.

2. It is admitted that the plaintiff constructed a house at a cost of Rs. 10,000 in the portion OPQR but it is not admitted that the portion RQUV is or ever was sehan of the plaintiff.

3. The allegation in para 3 of the plaint is admitted.

4. The defendant admits that about the month of July, 1959 he raised a kotha but denies that he has made any encroachment.

5. No question of defendant's ejectment arises.

Additional pleas

6. The plaintiff is not the owner of the land shown by letters RQUV in the sketch map at the foot of the plaint.

7. The defendant built the kotha at considerable expense in the presence of the plaintiff, on vacant land in the honest belief that it has been allotted to him at the partition, and the plaintiff, while knowing that the said land had been allotted to him, and that defendant was acting under the said honest belief, did not stop him. He is, therefore, estopped by the principle of acquiescence from having it demolished now.

8. The plaintiff has not been in possession, at any time, within 12 years before the suit, and the suit is barred by Art. 142 of the Second Schedule to the Limitation Act.

9. The suit is bad for non-joinder of Must. Ramdei who, on plaintiff's own showing, occupies the house with the defendant and is a necessary party.

Signed (Must. Ramdei)
Guardian for B

(Signed)

Dated.....

Verification

(4)

Written statement in suit for non-delivery of goods sold to plaintiff for cash but later sold to third person

(A) Written Statement of Defendant No. 1

In the Court of Small Causes, Delhi.

Sant Lal ... ... *Plaintiff*

versus

Pratap Chand and another ... ... *Defendants*

Written statement on behalf of defendant No. 1.

The aforesaid defendant No. 1 states as follows—

1. Para 1 of the plaint is denied. The plaintiff never purchased the cabinet from the defendant No. 1 but paid the sum of Rs. 300 only as an earnest money. The defendant No. 1, after waiting sufficiently for a long time, sold the cabinet to defendant No. 2. The plaintiff agreed to complete the sale of the cabinet within fourteen days.

2. Para 2 of the plaint is denied. The plaintiff himself failed to complete the sale within the stipulated time and, therefore, the defendant No. 1 sold the cabinet to the defendant No. 2.

3. Para 3 of the plaint is denied. The defendant No. 1 had a right to sell the cabinet to defendant No. 2.

4. Para 4 of the plaint does not relate to the answering defendant No. 1. It is admitted that the defendant No. 1 is the seller of the said cabinet to the defendant No. 2.

5. Para 5 of the plaint is denied. The plaintiff has no cause of action for the suit.

6. Para 6 of the plaint is legal and requires no reply.

It is, therefore, prayed that the suit be dismissed with costs.

(Sd.) Pratap Chand.
Defendant No. 1

Verification

I, Pratap Chand, the aforesaid defendant No. 1, do hereby verify that the contents of paras 1 to 4 of this written statement are true to my personal knowledge and those of paras 5 and 6 of this written statement are based on legal advice which I believe to be true.

(Sd.) Pratap Chand
15-5-67.

(B) Written Statement of Defendant No. 2.

(Here give the name of the Court and the title of the suit as in the written statement of defendant No. 1).

Written statement on behalf of defendant No. 2.

Chuni Lal, the aforesaid answering defendant No. 2, states as follows :—

1. Para 1 of the plaint is denied for want of knowl edge.
2. Para 2 of the plaint is denied for want of knowledge.

The answering defendant No. 2 is the purchaser in good faith for valuable consideration and without notice of and prior sale of the cabinet.

3. and 4. Paras 3 and 4 of the plaint are denied.

5. Para 5 of the plaint is denied. No cause of action arose to the plaintiff against the defendant No. 2.

6. Para 6 requires no reply.

It is, therefore, prayed that the suit be dismissed with costs and the special costs under Section 35-A of the C. P. C. be also awarded to the answering defendant.

(Sd.) Chuni Lal,
Defendant No. 2.

Verification

(5)

Written Statement in suit for injunction restraining nuisance and for damages

In the Court of Sub-Judge, Delhi

Suit No. 105 of 1968

Jugal Kishore ... ... *Plaintiff*

versus

Abdul Majid ... ... *Defendant*

Written statement on behalf of Abdul Majid, the defendant aforesaid.

The defendant aforesaid begs to state as follows—

1. Para 1 of the plaint is admitted.
2. Para 2 of the plaint is admitted.

3. Para 3 of the plaint is denied. The defendant erected the factory after seeing that there were other factories in the locality manufacturing similar fireworks. The defendant had taken sufficient and necessary precautions for preventing nuisance as the Muncipal by-laws required to be taken. Furthermore, the chimney of the factory is very high and far above the house of the plaintiff and the noise emitted is quite slight.

4. Para 4 of the plaint is denied. The plaintiff left the house only to file the suit and to harass the defendant.

6. Para 5 of the plaint is denied. The plaintiff is not entitled to any damages from the defendant.

5. The service of the registered notice is admitted.

7. Para 7 of the plaint is not admitted as it stands. The defendant is entitled to continue to work the factory.

8. No cause of action for the suit arose to the plaintiff against the defendant. It is admitted that this Court is competent to try the suit.

9. Para 9 of the plaint requires no reply.

It is, therefore, prayed that the suit be dismissed with costs.

(Sd.) Abdul Majid,
Defendant.

(Sd.) R. D. Agarwal,
Advocate.

Verification

I, the aforesaid defendant, solemnly affirm that the contents of paras 1 to 7 of this written statement are true to my personal knowledge and those of paras 8 and 9 are based on legal advice and believed to be true.

Verified at Delhi, this 8th day of August, 1968.

(Sd.) Abdul Majid
Defendant.

(6)

Written Statement in Interpleader suit

In the Court of Sub-Judge, Delhi.

Suit No. 458 of 1967.

A ... ... *Plaintiff.*

versus

C and another ... ... *Defendant.*

Written statement on behalf of defendant No. 2.

D, the above-named answering defendant No. 2, states as follows :—

1. Para 1 of the plaint is admitted.

2. Para 2 of the plaint is not denied except that the defendant No. 1 is not the adopted son of B. The defendant No. 1 was an orphan and the requisite ceremonies did not take place. B brought up the defendant No. 1 out of pity and charity. Without prejudice to this plea, the plaintiff had entered into an agreement with the defendant No. 1 before the date of the suit that if the defendant No. 1 succeeded in the suit, he would accept from the plaintiff Rs. 4,000 only in full satisfaction of his claim. B executed a will in favour of the answering defendant No. 2.

3. Para 3 of the plaint is admitted.

4 and 5. Paras 4 and 5 of the plaint are admitted.

6. Para 6 of the plaint requires no reply.

It is, therefore, prayed that the decree for Rs. 5,000 be passed against the defendant No. 1 and in favour of the answering defendant No. 2.

(Sd.) D.
Answering Defendant.

Verification

I, the aforesaid answering defendant, solemnly affirm that the contents of paras 1 to 6 of this written statement are true to my knowledge.

Verified at Delhi, this day of 1967.

(Sd.) D
Defendant No. 2.

(7)

Written Statement in suit for malicious prosecution

In the Court of Munsif, Allahabad.

Suit No. 598 of 1965

B ... ... *Plaintiff*

versus

C ... ... *Defendant.*

Written statement on behalf of C, the defendant aforesaid :

1. The defendant admits that the plaintiff is a respectable person and the rest of the allegation in para 1 of the plaint is denied.

2. The contents of para 2 of the plaint are admitted.

3. and 4. The contents of paras 3 and 4 of the plaint are admitted.

5. The defendant denies that the charge levelled by him against the plaintiff was false or without reasonable and probable cause or malicious.

The facts are that the charge was true. Even if it was not so, the defendant had reasonable and probable ground for believing it to be so.

6. The contents of para 6 of the plaint are denied.

7. The plaintiff suffered no damage. If he suffered any damage, the damage claimed by him is excessive.

8. and 9. Paras and 9 of the plaint require no reply.

10. The plaintiff is not entitled to any relief.

(Sd.) C.

I, C, declare that the contents of paras 1 to 10 of the written statement are true to my personal knowledge.

Verified at Allahabad this day of—

(Sd.) C.

(8)

Written Statement in suit for breach of agreement to marry

In the Court of City Munsif, Kanpur.

Suit No. 8 of 1961

B ... ... *Plaintiff*

versus

X ... ... *Defendant*

Written statement on behalf of defendant X.

(1) Para 1 of the plaint is admitted.

(2) Para 2 of the plaint is denied subject to the additional pleas.

(3) Para 3 of the plaint is denied. The articles supplied are denied.

(4) and (5). Paras 4 and 5 of the plaint are legal. The question of their admission and denial does not arise.

Additional Pleas

(6) The defendant was always prepared to marry the plaintiff but she herself through her father expressed unwillingness to marry the defendant. Consequently, the defendant married another girl. The breach, it any, has taken place on the part of the plaintiff.

(7) The damages claimed are excessive.

(Sd.) X.

Verification

I, X, verify that paras 1 to 7 of the written statement are true to my personal knowledge.

Verified at Kanpur on 3rd March, 1962.

(Sd,) X.
(Sd.) Jagdish Saran,
Advocate.

(9)

Written Statement in suit for redemption of mortgage with possession

In the Court of Civil Judge, Allahabad.

Suit No. of 1963

A, son of D, resident of ... ... Allahabad ... *Plaintiff*

versus

C, son of D, resident of ... ... Allahabad ... *Defendant*

Written statement of defendant C states as follows :—

1. Paras 1 and 2 of the plaint are admitted.

2. The defendant denies that the mortgaged money has been satisfied out of the usufruct of the mortgaged money.

3. The defendant denies that the acknowledgment by the defendant's predecessor was made within sixty years from the date of the execution of the mortgage. It was made only after the period of 60 years had expired.

4. The suit is time barred inasmuch as it has been filed, after sixty years from the date of the execution of mortgage.

Therefore, the suit be dismissed and costs be awarded to the defendant.

I, C, declare that the contents of paras 1 to 3 are true to my personal knowledge and information and the knowledge of the contents of para 4 is derived from my counsel which I believe to be true.

(Sd.) C
Defendant
(Sd.).....Advocate.
Counsel for the Defendant,

(10)

Written State ment in suit for recovery of price of goods sent for repairs, on ground of loss of repaired goods in transit

In the Court of Small Causes, Delhi.

Suit No. 60 of 1965

Amarnath ... ... *Plainztiff*

versus

Basant Lal ... ... *Defendant*

Written statement on behalf of Basant Lal, the defendant aforesaid :

1. Para 1 of the plaint is admitted.
2. Para 2 of the plaint is admitted.
3. Para 3 of the plaint is admitted.

4, Para 4 of the plaint is denied. The defendant did the necessary repairs to the jewellery and despatched them from Calcutta to the plaintiff by uninsured parcel post on (date) as was the practice between the parties. If the jewellery is lost, the defendant is not responsible for the same. There has been no negligence or want of precaution on the part of the defendant. On previous occasions also, the goods were never despatched by the defendant to the plaintiff by insured parcel post and as such failure to insure does not create any liability.

5. The service of notice upon the defendant is admitted.
6. Para 6 of the plaint is emphatically denied.

7. Plaintiff is not entitled to recover Rs. 500 from the defendant or any other sum.

8. Para 8 of the plaint is denied. No cause of action ever arose to the plaintiff against the defendant as the jewellery was duly despatched after repairs to the plaintiff. This court is not competent to try the suit as the defendant carries on business and resides in Calcutta.

9, Para 9 of the plaint requires no reply.

The defendant, therefore, prays that the suit be dismissed with costs and compensatory costs under Section 35-A of Civil Procedure Code be also awarded to the defendant.

(Sd.) Basant Lal.

Verification.—I, Basant Lal, the above-named defendant, solemnly affirm that the contents of paras 1 to 7 are true to my personal knowledge and those of paras 8 and 9 are believed to be true on information received.

Verified at Calcutta, this 10th day of August, 1965.

(Sd.) Basant Lal.
Defendant.

(11)

Written Statemet in suit by registered firm for recovery of amount as price of goods sold and delivered

In the Court of Civil Judge. Allahabad.

Suit No. 540 of 1967.

A & Co. ... ... *Plaintiff*

versus

B & Co. ... ... *Defendant*

Written statement on behalf of defendant.

B & C . the aforesaid answering defendant, states as under :—

(1) Para 1 of the plaint is denied. The plaintiff is a partnership firm which is not registered under the Indian Partnership Act and is hence not competent to sue. The suit is barred by section 69 of the said Act.

(2) In para 2 of the plaint, it is admitted that the defendant placed an order with the plaintiff for the purchase of the goods worth Rs. 5,400 and that the plaintiff despatched two packages containing the alleged goods to the defendant. In order to assure that the goods corresponded in quality and nature with those ordered, the defendant asked the plaintiff to give open delivery of the goods and declined to accept the Railway Receipt sent through the bank. In pursuance of the written request and assurances of the plaintiff that the goods really corresponded with those ordered, the defendant accepted the railway receipt. Later immediately on the examination of the said packages, it was found that the goods were damaged to a considerable extent with oil with the result that they could not be sold in the market. Thus, the defendant has suffered loss of profit of Rs. 3,000 that would have been earned on sale of those goods, which the defendant is entitled to recover from the plaintiff as damages. The defendant is filing a separate suit for damages.

(3) Para 3 of the plaint is denied. No cause of action accrued to the plaintiff against the defendant.

(4) Para 4 of the plaint requires no reply.

It is, therefore, prayed that the suit be dismissed with costs.

(Sd.) Ram Kumar
For B & Co, Defendant.

[*Verification* of Ram Kumar on behalf of B & Co.]

(12)

Written Statement in suit for ejectment of tenant

In the Court of Sub-Judge, Delhi

Suit No. 151 of 1963

A. B. ... ... *Plaintiff.*

versus

C. D. ... ... *Defendant.*

Written statement on behalf of C. D.,defendant.

C. D. the aforesaid answering defendant, states as follows:—

(1) Para 1 of the plaint is admitted.

(1-A) Para 1-A of the Plaint is wrong and denied. The plea of personal requirement of the property in dispute is *malafide* and is wrong on facts. The

plaintiff already occupies spacious four roomed said house owned by him, which is quite sufficient for him and his family. The whole object of the suit is to compel the defendant to pay the enhanced rate of rent. On the refusal of the defendant to pay rent at an enhanced rate, the plaintiff threatened the defendant with ejectment.

(2) Para 2 of the Plaint is wrong and is emphatically denied. The determination of the tenancy is not legal and the notice to quit is void.

(3) Para 3 of the plaint is denied. The answering defendant is not liable to ejectment.

(4) No cause of action has arisen to the plaintiff against the defendant.

(5) Para 5 of the plaint requires no reply.

Additional plea

(6) The suit for ejectment is not maintainable. The notice of termination of the tenancy was served on the defendant on 17th December, 1962 and required the vacation of the bungalow by 31st December, 1962. Thus clear 15 days' notice has not been given.

It is, therefore, prayed that the suit be dismissed with costs and special costs be also allowed to the defendant under section 35-A, C. P. C. as the suit is not *bona ide* and is vexatious.

(Sd.) C. D.
Defendant.

[*Verification*]

I, C. D. the answering defendant, do hereby verify that the contents of paragraphs 1 to 6 of this written statement are true to my personal knowledge and belief

Verified at Delhi on the day of... ... ..., 19.

(13)

Written Statement in suit on Pronote

In the Court of Munsif, West, Allahabad

Suit No. 700 of 1964

Sita Ram ... ... *Plaintiff*

versus

Hanuman Prasad ... ... *Defendant.*

Written statement on behalf of defendant.

Hanuman Prasad, the aforesaid defendant, states as under: —

1. Para 1 of the plaint is admitted only to this extent that the defendant signed the pronote. It is wrong that any lawful consideration passed from the plaintiff to the defendant for the pronote. The defendant was then being prosecuted for murder in the Court of Sessions Judge, Allahabad and the plaintiff induced him to make the pronote in consideration of the plaintiff securing pardon for the defendant.

2. Para 2 of the plaint is denied and no amount is due to the plaintiff from the defendant for principal or interest.

3. Receipt of the notice asking for payment is admitted and a proper reply was sent to the plaintiff by the defendant.

4. Para 4 of the plaint is denied. No cause of action accrued to the plaintiff.

5. Para 5 of the plaint is legal and requires no reply.

Additional plea

6. The pronote forming the basis of the suit is unstamped and is, therefore, inadmissible in evidence. The suit is not competent on the basis of such note.

It is, therefore, prayed that the suit be dismissed with costs.

(Sd.) Hanuman Prasad,
Defendant

Verification

(14)

Written statement in suit for specific performance of contract

In the Court of Civil Judge, Delhi
Suit No. 514 of 1967

A ... ... *Plaintiff*

versus

B ... ... *Defendant*

Written Statement on behalf of defendant.

B, the answering defendant, states as follows :—

1. Para 1 of the plaint is denied. The defendant agreed to sell the alleged property to the plaintiff for Rs. 3 lacs and received Rs. 20,000 as earnest money from the plaintiff. The terms of the agreement to sell were as follows :—

(a) Possession, and not vacant possession, will be delivered on registration of the deed of sale ;

(b) The plaintiff will buy the requisite stamp paper within a month of the date of the said agreement and deliver it to the defendant to execute the deed ;

(c) The sale-deed will be got registered and the price paid within 50 days of the date of the said agreement and, in default of the plaintiff, the earnest money will be forfeited.

2. Para 2 of the plaint is denied. The plaintiff himself has failed to perform the important terms of the contract within the stipulated time. Even he was not ready and willing to do so. The plaintiff failed to deliver the requisite stamp paper in spite of the defendant's request in writing. The defendant forfeited the said earnest money due to failure of the plaintiff to make payment within the agreed time of 50 days and treated the contract as cancelled. In spite of the plaintiff had the knowledge at the date of the agreement that most part of the said property was let and that the possession under the agreement meant possession by attonment of the let out portion and vacant possession of the rest of the portion.

3. Para 3 of the plaint is denied. No cause of action accrued to the plaintiff against the defendant.

4. Para 4 of the plaint requires no reply.

It is, therefore, prayed that the suit be dismissed with costs.

(Sd.) B
Defendant.

Verification

I, the aforesaid answering defendant, declare that the contents of paras 1 and 2 of the written statement are true to my personal knowledge and belief and those of paras 3 and 4 are believed to be true.

Verified at Delhi this.....day of....., 1967,

(Sd.) B

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